

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1949

No. 271

ALCOA STEAMSHIP COMPANY, INC., PETITIONER,

vs.

THE UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED AUGUST 10, 1949.

CERTIORARI GRANTED OCTOBER 10, 1949.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

**IN UNITED STATES DISTRICT COURT, SOUTHERN
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DOCKET ENTRIES

July 19, 1946—Filed complaint and issued summons.

July 24, 1946—Filed summons and return. Served Mary Cassidy of United States Attorney's Office, Southern District of New York on July 19, 1946.

Served Attorney General by registered mail on July 19, 1946.

January 13, 1947—Filed answer of defendant.

February 10, 1947—Filed reply to counterclaim of defendant's answer.

April 2, 1948—Trial begun and concluded before Leibell, J. (April 15, 1948 for reply briefs and criticisms of opponent's findings)

April 29, 1948—Filed transcript of record of proceeding April 2, 1948.

May 3, 1948—Filed findings of fact and conclusions of law and opinion No. 17451 granting plaintiff judgment on the merits. Leibell, J.

May 14, 1948—Filed judgment No. 49289 in favor of plaintiff against defendant for \$3,520.52 and dismissing setoff and counterclaim of \$3,520.52 of defendant. Leibell, J.

July 12, 1948—Filed notice of appeal by defendant. Mailed copy to Wood, Molloy, France & Tully on July 13, 1948.

[fol. 2]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil 37-41

ALCOA STEAMSHIP COMPANY, INC., Plaintiff,
against

THE UNITED STATES OF AMERICA, Defendant.

COMPLAINT

The plaintiff by its attorneys, Wood, Molloy, France & Tally, for its complaint against the defendant, alleges as follows:

First: That at all the times hereinafter mentioned, the plaintiff was and still is a citizen of the United States and a corporation, duly organized and existing under and by virtue of the laws of the State of New York, with its principal office and place of business at No. 17 Battery Place, Borough of Manhattan, City and State of New York, within the Southern District of New York. This action is brought under paragraph 20 of Section 24 of the Act of March 3, 1911, 36 Stat. 1093 (28 United States Code, Section 41 (20)). The plaintiff's claim does not exceed \$10,000 and is founded upon a contract, express or implied, with the Government of the United States, as hereinafter more expressly appears.

Second: That heretofore the plaintiff carried on its vessels at the request of and for the defendant certain consignments of lumber as follows:

[fol. 3] 1. On the SS. PLOW CITY, in and about January, 1942, from St. Joe, Florida, to Port of Spain, Trinidad, B. W. I., 1,150,768 feet of lumber.

2. On the SS. ALCOA TRADER, in and about November, 1941, from Tampa, Florida, to Port of Spain, Trinidad, B. W. I., 837,113 feet of lumber.

That the said shipments were duly delivered to the defendant at Port of Spain, Trinidad, B. W. I.

That the freight charge for the foregoing shipments, computed in accordance with the prevailing conference tariff rate, was in the case of the shipment on the SS. PLOW

CITY \$24,453.83 and in the case of the shipment on the SS. ALCOA TRADER \$17,788.65.

Third: That the said amounts were billed by the plaintiff to the defendant (represented by the War Department, Finance Officer, U. S. Army, Washington, D. C.) on the prescribed "Public Voucher for Transportation of Freight or Express", and thereafter the said sums, to wit, \$24,453.83 on or about March 25th, 1942, and \$17,788.65 on or about March 19th, 1942, were paid by the defendant to the plaintiff. That copies of the said Public Vouchers and the memorandum accompanying the checks in payment of the said sums of \$24,453.83 and \$17,788.65 are attached hereto and marked Exhibits 1a, 1b, 2a, and 2b, and made a part hereof.

Fourth: That thereafter the plaintiff presented to the defendant another bill for freight, for cargo carried by the plaintiff for the defendant from New York to Port of Spain, Trinidad, in the amount of \$23,137.79. That the Comptroller General of the United States reviewed the bill and allowed the same except for a disallowance of \$358.35, but deducted therefrom, among other similar deductions, the sum of \$4,890.77, which he claimed was an overpayment of the freight monies on the shipment on the SS. PLOW CITY, set forth in paragraphs Second and Third hereof, and the sum of \$3,557.73, which he claimed was an overpayment of the freight monies on the shipment on the SS. ALCOA TRADER, set forth in paragraphs Second and Third hereof. That said action was taken by the Comptroller General on or about January 11, 1945.

Fifth: That the basis of the claim of over-payment made by the Comptroller General as set forth in paragraph Fourth hereof, was that the prevailing freight tariff did not permit a surcharge of 25% which had been incorporated in the freight bills set forth in paragraphs Second and Third hereof. However, the Comptroller General stated that his office would give consideration to any material evidence which the plaintiff might offer to sustain the validity of the said surcharge which the Comptroller General had deducted as aforesaid.

Sixth: That thereafter the plaintiff did submit such evidence and support for the validity of its right to the said surcharge and on and about August 29th, 1945, the plain-

tiff was advised that the Comptroller General had reconsidered his decision as to the invalidity of the said surcharge of 25% and that the amounts of \$3,557.73 and \$4,890.77 theretofore deducted as set forth in paragraph Fourth hereof would be repaid to the plaintiff upon presentation of an appropriate claim.

Seventh: That thereafter and in or about January 9, 1946, the plaintiff did file in appropriate form its claims [fol. 5] for refunds of the said sums of \$3,557.73 and \$4,890.88, deducted as set forth in paragraph Fourth hereof, and on February 2nd, 1946, the Comptroller General certified in writing that the said sums of \$3,557.73 and \$4,890.77, making a total of \$8,448.50, were due to the plaintiff.

Eighth: That the Comptroller General, however, improperly and unlawfully deducted \$3,520.52 from the said total amount of \$8,448.50, certified and acknowledged by the defendant to be due to the plaintiff, and remitted to the plaintiff only such difference, to wit, \$4,927.98.

Ninth: That there remains due and owing to the plaintiff from the defendant the sum of \$3,520.52, being the difference between the total sum of \$8,448.52, which the Comptroller General on February 2, 1946 found and certified to be due and owing to the plaintiff, and the sum paid, \$4,927.98, no part of which difference has been paid to the plaintiff, although duly demanded by the plaintiff and refused by the defendant.

Wherefore, plaintiff demands judgment in the sum of \$3,520.52, with costs.

Wood, Molloy, Francé & Tully, Attorneys for Plaintiff, Office & Post Office Address, 25 Broad Street, Borough of Manhattan, New York 4, N. Y.

(Verified by Robert D. Weeks, Treasurer, Alcoa Steamship Company, Inc. on July 17, 1946.)

(Here follow 2 Photolithographs, side folios 6-7, 8-9)

EXHIBIT ANNEXED TO COMPLAINT

The enclosed check, No. 245747, with the voucher submitted for payment of the account described in the memorandum hereon.

(The acknowledgment of receipt of checks is important)

Name: Alcoa Steamship Company, Inc.
 Address: 17 Battery Place
New York, N.Y.

RECEIVED

It is requested that the amount in the attached statement be paid to the undersigned as soon as possible. The check should be payable to the undersigned or to the order of the undersigned. The check should be made payable to the order of the undersigned or to the order of the undersigned. The check should be made payable to the order of the undersigned or to the order of the undersigned.

Very respectfully,
[Signature]
[Name]
[Address]
[City, State, and Zip]

U.S. Army, Washington, D.C.

Bill No. C-534 (R-3901)
 Amount, \$17788.65
 Cont. 3/10 WP-231284
 Due 3/1 T-200
39 Flood Trader, Wyo. 10

Standard Form No. 1000
Form approved by
Comptroller General U. S.
June 25, 1951

[illegible]

Public Voucher for Transportation of Freight or Express

This number consists of _____ sheets

(Statement of consent must be completely filled in by the donor prior to signature, and there must not be any omissions or alterations unless initialed or signed)

U.S. War Department, Finance Officer, U.S. Army,
Washington, D. C. (Department, Bureau, or Headquarters)

RESEARCH

RESEARCH

END

Form of Paper Used

THE UNITED STATES, DR.

To Japan Steamship Company, Inc.

Address 17 Battery Place, New York, N.Y.

[illegible][illegible]

Total	317700	69
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MEMORANDUM

MEMORANDUM

Chief Billing Clerk

(Additional statements by Department, Bureau,
or Establishment, if desired necessary)

Pages must NOT use this space

Discrepancy:

Account verified; correct for.....0

(Signature or Initials)

MEMORANDUM

Paid by Check No

dated

19 for 3

no Treasurer of the United States
in favor of payee named above.

[fol. 10]

IN UNITED STATES DISTRICT COURT

ANSWER

Defendant, answering the complaint herein, alleges upon information and belief as follows:

First: Denies that it has any knowledge or information sufficient to form a belief as to Plaintiff's citizenship or residence, corporate status and office address. Admits that Plaintiff's alleged claim is purportedly founded on a certain contract or contracts and that the amount mentioned in the complaint does not exceed \$10,000.00. Denies the truth of the other allegations contained in the First paragraph.

Second: Admits that the shipments referred to in the Second paragraph of the complaint were transported by Plaintiff on the SS PLOW CITY and SS ALCOA TRADER, respectively, that said shipments were delivered to defendant or its order at destination and that the freights specified in the respective bills of lading were \$24,453.83 and \$17,788.65. Denies the truth of the other allegations contained in the Second paragraph.

Third: Admits that the said freights were billed by Plaintiff to Defendant and were paid in full by Defendant to Plaintiff at or about the times referred to in the complaint. Admits further that the photostats annexed to the complaint and marked exhibits 1a, 1b, 2a and 2b are true copies of the public vouchers and memoranda accompanying the checks in connection with the said billings and payments.

[fol. 11] Fourth: Admits that thereafter the total sum of \$8,448.50 was withheld or deducted from a bill or bills presented by Plaintiff to Defendant on the grounds that the payments referred to in the preceding paragraph of this answer were an overpayment of freight in that amount. Denies that it has any present knowledge or information sufficient to form a belief as to the truth of the other allegations contained in the Fourth paragraph.

Fifth: Except to the extent hereinafter indicated, it denies that it has any present knowledge or information sufficient to form a belief as to the truth of the allegations contained in the Fifth paragraph.

Sixth: Denies that the advices, if any, of the Comptroller General were that the said total sum of \$8,448.50 would be repaid to Plaintiff and alleges that said advices, if any, were that the said sums would be repaid only in the event there were no other overpayments, erroneous payments, or illegal or unauthorized payments by Defendant to Plaintiff and only in the event that there were no other sums due Defendant from Plaintiff, by virtue of any demands, offsets, or counterclaims in favor of Defendant and against Plaintiff or otherwise. Except to the extent indicated, it denies that it has any present knowledge or information sufficient to form a belief as to the truth of the other allegations contained in the Sixth paragraph.

Seventh: Admits that on or about January 9, 1946, Plaintiff addressed a certain letter or letters and forms to Defendant in connection with a claim for the payment of the said total sum of \$8,448.50. Denies that the Comptroller General's certification, if any, was that the said total amount [fol. 12] was due Plaintiff and alleges that the said certification, if any, was that such amount was due Plaintiff only in the event that there were no other overpayments, erroneous payments or illegal or unauthorized payments by Defendant to Plaintiff and only in the event there were no other sums due and owing to Defendant from Plaintiff by reason of any claims, demands, offsets, or counterclaims in favor of Defendant and against Plaintiff or otherwise. Except to the extent indicated, it denies it has any present knowledge or information sufficient to form a belief as to the truth of the allegations contained in the Seventh paragraph.

Eighth: Admits that the sum of \$3,520.52 was deducted from the said total sum of \$8,448.50, that the said sum of \$3,520.52 was not paid, and that the balance or \$4,927.98 was paid by Defendant to Plaintiff. Denies the truth of the other allegations contained in the Eighth paragraph.

Ninth: Admits that sum of money has been demanded and not paid. Denies the truth of the other allegations contained in the Ninth paragraph.

For a Separate and Complete Defense

Tenth: Alleges that at and during all the times referred to in the complaint Defendant was and still is a Sovereign.

Eleventh: Alleges that the sum of \$3,520.52 referred to in the complaint represents ocean freight claimed to be due Plaintiff from Defendant for the ocean transportation of a shipment or shipments of cargo owned or possessed by the United States on an ocean going vessel or vessels owned or operated by Plaintiff pursuant to a written contract [fol. 13] tract or contracts of carriage, commonly known as a bill or bills of lading, the said contract or contracts being maritime and accordingly Plaintiff's remedy, if any, is exclusively pursuant to the Act of March 9, 1920, 41 Stat. 525, commonly known as the Suits in Admiralty Act (46 USC 741-752), which said Act repeals the Tucker Act (28 USC 41 (20)) referred to in the First paragraph of the complaint in so far as causes of action within the jurisdiction of courts of admiralty are concerned, and accordingly Defendant has not consented to be sued in the cause of action purportedly set forth in the complaint, this Court is without jurisdiction over the subject matter of the cause of action alleged in the complaint and over the person of Defendant, and the complaint should be dismissed.

For a Separate and Complete Defense

Twelfth: Repeats and realleges all the allegations contained in the Tenth and Eleventh paragraphs of this answer with the same force and effect as if herein set forth at length.

Thirteenth: Alleges that Section 5 of the said Suits in Admiralty Act (46 USC 745) provides that suits under that Act must be commenced within two years after the cause of action arises.

Fourteenth: Alleges that suit herein was not commenced as provided in the said Suits in Admiralty Act and accordingly, even if this Court shall have jurisdiction over the cause of action and over the person of Defendant by reason of the matters alleged in the complaint, which jurisdiction Defendant denies, suit herein is barred and the complaint should be dismissed.

[fol. 14] As a Further Set-Off, Counterclaim and Complete Defense

Fifteenth: Alleges that on or about June 13, 1942, at Mobile, Alabama, Defendant, through the War Department,

through its District Engineer, Mobile District, delivered a shipment totaling 28,896 pieces of dressed yellow pine in good order and condition to Plaintiff and to the SS GUNVOR, which said shipment Plaintiff and the SS GUNVOR received and accepted and agreed to transport on the SS GUNVOR from the Port of Mobile to the Port of Port of Spain, Trinidad, there to be delivered in the same good order and condition as when received, to Defendant, through the District Engineer, United States Engineer's Office, Port of Spain, Trinidad, pursuant to all the terms and conditions contained in a certain contract of carriage evidenced by Government bill of lading, standard form 1058 No. WE 310320, then and there issued and signed by or on behalf of Plaintiff by a duly authorized agent of the Plaintiff.

Sixteenth: Alleges that the said bill of lading contains, among others, the following terms and conditions:

"Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

"Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same [fol. 15] rates and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier."

"• • • The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made."

Seventeenth: Alleges that the said shipment was never delivered by Plaintiff to Defendant at the Port of Spain, Trinidad, or at any other place, that on information and belief the said shipment was lost at sea during transit, that Defendant and/or the consignee did not sign the said bill of lading and that Plaintiff did not present the said bill of lading properly accomplished to Defendant as pro-

vided in the above quoted provisions of the said contract of carriage.

Eighteenth: Alleges that thereafter and on or about September 25, 1942, freight on the said shipment in the sum of \$3,520.52 was paid by Defendant to Plaintiff.

Nineteenth: Alleges that the said payment of \$3,520.52 was erroneous, was made under a mistake of law and/or of fact, was contrary to the above quoted provisions of the said bill of lading, was unauthorized, was illegal and was contrary to law.

Twentieth: Alleges that by reason of the premises, at and during the times referred to in the complaint, and particularly in the Fifth, Sixth, Seventh, Eighth and Ninth [fol. 16] paragraphs of the complaint, there was due and owing from Plaintiff to Defendant the sum of \$3,520.52.

Twenty-first: Alleges that by reason of the premises the withholding or deduction of \$3,520.52, referred to in the complaint, was proper and lawful and the complaint herein to recover the said deduction should be dismissed.

Wherefore, Defendant prays that the complaint herein be dismissed with costs and that it may have such other and further relief as may be just in the premises.

John F. X. McGohey, United States Attorney, Attorney for Defendant, Office & P. O. Address, 45 Broadway, Borough of Manhattan, City of New York.

(Signed on behalf of John F. X. McGohey, United States Attorney and filed January 13, 1947.)

[fol. 17] IN UNITED STATES DISTRICT COURT

REPLY

The plaintiff by its attorneys, Wood, Molloy, France & Tully, for its reply to the counterclaim contained in the defendant's answer herein, alleges as follows:

First: The plaintiff admits that the said shipment was never delivered by plaintiff to defendant at the Port of Spain, Trinidad, or at any other place, and that the said

shipment was lost at sea during transit. The plaintiff denies each and every other allegation contained in the Seventeenth paragraph of the answer.

Second: The plaintiff denies each and every allegation contained in paragraphs of the answer designated "Nineteenth", "Twentieth" and "Twenty-first".

Wherefore plaintiff demands judgment dismissing the counterclaim of the defendant, with costs, and demands judgment as demanded in the complaint.

Wood, Molloy, France & Tully, Attorneys for Plaintiff, Office & Post Office Address, No. 25 Broad Street, New York 4, N. Y.

(Verified by Robert D. Weeks, Treasurer, Alcoa Steamship Company, Inc. on February 7, 1947.)

[fol. 18] IN UNITED STATES DISTRICT COURT

Statement of Evidence

PLAINTIFF'S CASE

WILLIAM T. COLE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. France:

Q. Mr. Cole, what position do you have with the Alcoa Steamship Company?

A. Auditor and assistant secretary.

Q. How long have you been with that company?

A. I have been with the Aluminum Company of America approximately 30 years and the steamship end of it about 20 years.

Q. The Aluminum Steamship Company, or the Alcoa Steamship Company is a New York corporation?

A. That is right.

Q. And its principal office is where?

A. New York.

Q. How long have you held your present position as auditor?

A. Oh, approximately 20 years.

Q. Mr. Cole, you have seen the complaint in this action?

A. Yes.

Q. And there are certain exhibits that are attached to it that were admitted in the answer. They were payments by the United States, through the War Department; of certain freight charges which were allegedly earned by you on the steamships Plow City and the Alcoa Trader. I just show you the originals (handing). You are familiar with them?

A. That is right.

Q. Later than those documents, was there a claim filed by you for freight transported by vessels, or a vessel, of [fol. 19] the Alcoa Steamship Company from New York Port of Spain?

Mr. France: I want to identify the claim at the top (handing to witness).

A. That is right.

Q. At the presentation of that claim and the consideration by the Comptroller-General did you receive this document?

A. Yes, sir.

Mr. France: Mr. Postner, I suppose you are familiar with that (handing).

I offer it in evidence.

The Court: What is it, counselor? Describe it on the record.

Mr. France: It is a return of the Comptroller-General to the claim which the witness has just referred to, in which there is deducted the two amounts which are shown in the exhibits attached to the complaint, on the ground that there had been an excess charge. In the parts that I would like particularly to call to the attention of the Court, and which are the only parts that are relevant in this case, are the items that are marked off with a check and a red circle, on pages 5 and 6. They show the deduction of the sums—or 25 per cent of the sums which had been paid to Alcoa Steamship on the prior shipments, on the ground that 25 per cent surcharge of freight was not warranted.

(Marked Plaintiff's Exhibit 1.)

[fol. 20] Mr. Postner: Just to straighten this out, could I ask the witness to identify those ships or shipments that these deductions were made against?

The Court: Which vessels?

Mr. Postner: Yes. It now appears that the deductions were made later. I don't think that changes the principle.

Mr. France: I think I can straighten that out.

The Court: Well, we will see what it is. These deductions were made against the two ships that you referred to there, the Plow City and the Trader?

Mr. France: Yes.

By Mr. France:

Q. Did Alcoa, through you, enter a protest against these items of 25 per cent surcharge which were claimed to be improper?

A. We did.

Q. I show you a letter from the General Accounting Office, and ask you whether that letter was in response to your letter of protest (handing to witness)?

A. That is right.

Mr. Postner: No objection.

The Clerk: The first document is marked Plaintiff's Exhibit 1.

The Court: What was the date of that?

The Clerk: I believe that was January 11, 1945.

Mr. France: That is correct.

The Court: All right. Now the government's letter is what date?

The Clerk: December 18, 1944, referring to Exhibit 2.

(Marked Plaintiff's Exhibit 2.)

[fol. 21] Q. Now in response to that letter, which in its last paragraph said you might submit which you wished to, did you submit a letter to the Comptroller-General on this subject of the 25 per cent surcharge which had been made?

A. Yes, sir.

Mr. Postner: Is this the letter?

Mr. France: This is a copy of the letter.

Mr. Postner: No objection.

(Marked Plaintiff's Exhibit 3.)

The Court: What is the date?

The Clerk: Dated February 16, 1945.

The Court: Is it in the form of a letter?

Mr. France: Yes, it is in the form of a letter from Alcoa to the Comptroller-General.

Q. Subsequent to that letter, and in the month of August of 1945, were you at the office of the Comptroller-General?

A. (Nodding) One of the branches.

Q. Did you receive any word at that time that you might submit claims for these deductions which had been made?

A. Yes, sir.

Mr. Postner: I object to that, your Honor - the form of the question.

The Court: Overruled.

Q. I show you a letter dated January 9th, and ask you whether that is a copy of a claim for refund which you made after that direction (handing paper to witness)?

A. Yes, sir, it is.

[fol. 22] Mr. France: I offer it in evidence.

(Marked Plaintiff's Exhibit 4.)

The Court: Date?

The Clerk: Dated January 9, 1946.

Q. I show you a copy of another letter, the same date, January 9, 1946, which you sent to the Comptroller as a claim for refund?

A. Yes.

Mr. Postner: No objection.

(Marked Plaintiff's Exhibit 5.)

The Court: Are these separate sums? Different sums?

Mr. France: They are different sums. They go back to the original sums which were deducted.

The Court: Yes, one under the Plow City and the other under the Trader.

Mr. France: Yes, correct.

Q. Did you receive a reply and advice from the Comptroller-General in reply to the claims which have just been offered in evidence as Plaintiff's Exhibits 4 and 5?

A. Correct.

Q. Is this document it?

A. That is right.

Mr. Postner: I have no objection to the method of proof.

(Marked Plaintiff's Exhibit 6.)

[fol. 23] Mr. Postner: There is no objection to the proof of that document, your Honor, but I have, or may have, one objection to a possible interpretation of it, particularly the words "There is due you"—so much of it. If it means the full amount less the deduction there would be no objection.

The Court: I would have to see the document, wouldn't I, in order to interpret it?

Mr. Postner: Yes, your Honor.

The Court: Well, I think it is pretty clear what they are doing. The government says, "Now here: In respect to your claim for the sum of \$3557.73, which is on the Alcoa Trader, and your claim for \$4890.77 which is on the Plow City, those claims are allowed, but we make therefrom a deduction. We overpaid freight to the extent of \$3,520.52 in connection with a shipment on the s.s. Gunvor, lost through enemy action, and we are deducting that amount, the \$3520.52."

Now apparently they deducted it from the \$4890.77, the claim asserted by Alcoa in connection with the Plow City.

Mr. Postner: If that is clear I withdraw the objection. I just didn't want—let me put it this way: We first started and we made a deduction for incorrect reason, and then—

The Court: I think I understand it, counselor. The company billed you a certain amount of freight on the Plow City and a certain amount of freight on the Alcoa Trader, and the bill in each instance contained a plus 25 per cent—

Mr. Postner: That is right.

[fol. 24] The Court: That 25 per cent in the case of the Plow City amounted to \$4,890.77, and in the case of the Alcoa Trader to \$3,557.73. The Comptroller-General disallowed the claim of that 25 per cent. Later on there were communications between the parties, and he permitted them to submit additional proof, they claiming a refund of those two sums, and then he recognized that they were right, that he should not have deducted the 25 per cent on the freight of those two shipments, and so he reversed himself on that and allowed their claims for those two sums. But

he said, "We find, in going over our records, that we paid you freight on another shipment which was lost through enemy action, and you were not entitled to any freight."

I assume from reading your briefs that that was because the shipment was not delivered at its destination.

Mr. Postner: That is the situation. That is the one thing I wanted to be cleared up.

The Court: Yes, but according to the document marked Plaintiff's Exhibit 6 the deduction of the \$3,520.52—they deducted that from the bill of \$4,890—the claim for refund of \$4,890.77 is in connection with the Plow City shipment.

All right, what else have you?

Mr. France: I think, even though it may seem part of defendant's case, I would like to put in some proof on this Gunvor—my theory of how it arose.

The Court: Go ahead.

[fol. 25] By Mr. France:

Q. On the freight which was shipped on the s.s. Gunvor, is this a memorandum which accompanied the check of payment which came from the War Department (handing)?

A. Correct.

Mr. Postner: No objection.

(Marked Plaintiff's Exhibit 7.)

Q. I show you a paper from the General Accounting Office, and ask you whether that was received by you on about the date that is stamped there?

A. It was.

The Court: Did you mark that exhibit, Mr. Clerk?

The Clerk: Are you talking about the memorandum, your Honor?

The Court: Yes.

The Clerk: Yes, I marked that Exhibit 7.

Mr. France: I offer it in evidence, and there is no objection.

Mr. Postner: No objection.

Mr. France: Would you like it described a bit, sir? This is a notice from the General Accounting Office that the \$3,520 which was paid for freight on the Gunvor was regarded as an overpayment and the authority for it is written here, but it is just a notice.

The Court: What is the date of it, counselor?

Mr. France: July 24, 1944. J

(Marked Plaintiff's Exhibit 8.)

[fol. 26] Q. I show you a shipping order received from the War Department, for shipment of goods which was shipped on the Gunvor. Is that the original order?

A. That is right.

Q. And let me ask you this: You are familiar with the government's bill of lading?

A. Yes, sir.

Q. Are the terms on the back of that order the terms of the government bill of lading?

A. Yes, sir.

Mr. Postner: No objection.

(Marked Plaintiff's Exhibit 9.)

Q. I show you a blank form of bill of lading of the Alcoa Steamship Company. Will you state whether or not that was the form or bill of lading used by the Alcoa at the time of the Gunvor shipment (handing)?

A. That is right.

Mr. Postner: I have no objection to this one, your Honor, provided we can't find the actual carrier's bill of lading. I have a reference to it in some of my documents that I will ask the witness about.

The Court: Well, where is the actual carrier's bill of lading?

Mr. Postner: I don't know, your Honor, but I may be able to bring it out in cross-examination on this voucher submitted for this Gunvor freight by Alcoa. There is a reference to carrier bill of lading M2209. I think M2209 is the best evidence, but if that can't be located I have no objection to the regular form bill of lading.

The Court: What is this reference to this Exhibit 9?

The Witness: That is practically a copy of the government bill of lading.

[fol. 27] Mr. France: That is the order?

The Witness: That is the order to ship the goods.

Q. It is an order from the disbursing agent of the United States Government?

The Court: Who issued the bills of lading? Did the government issue them or the company?

The Witness: The government.

The Court: On any of their shipments?

The Witness: That is right. There is a white bill of lading attached to this, and then there is a salmon-colored one, and I think there is some other memorandum copies, and the white bill of lading which is issued to you is signed by the government officer shipping the goods.

The Court: Where was that in this case, in connection with the Gunvor?

Mr. Postner: I have a certified photostatic copy of it, your Honor.

The Court: Show it to the witness.

(Mr. Postner hands photostats to the witness.)

Mr. Postner: This is put together so I can't take them apart, but it is the third and fourth pages there.

The Witness: That is right.

The Court: Now are we marking this blank bill of lading Exhibit 10—the blank form used by Alcoa?

Mr. Postner: That is all right.

The Court: Now was there any such bill of lading issued in connection with this shipment?

[fol. 28] Mr. France: Like that? No, sir, because it is incorporated by the terms of the government bill of lading.

The Court: Oh, I see.

(Marked Plaintiff's Exhibit 10.)

The Court: Have you that white bill of lading now?

Mr. Postner: No, your Honor, we do not have the white one. I just have a certified copy of it.

The Court: Well, all right.

Mr. France: That is all right, I have no objection to it.

Mr. Postner: I have a certified copy right here.

The Court: You may show it to the witness, and if the plaintiff wishes it he may do so.

Mr. Postner: I just showed it to the witness and he is certain it is a copy.

The Court: Now what would you call this paper that the witness has just looked at?

Mr. France: That is a certified copy of the original bill of lading. Am I correct?

Mr. Postner: Correct.

The Court: The so-called white bill of lading.

Mr. France: The so-called white bill of lading, yes. Seeing it is here I am glad to offer it in evidence.

The Court: All right.

Mr. Postner: There is a little practical difficulty here, your Honor. There are several papers all in one certificate.

The Court: All right, we will mark that one.

[fol. 29] Mr. Postner: He may not wish to put all of them in.

The Court: I understand. That one will be marked Exhibit 11.

Mr. Postner: It is the third and fourth pages there.

(Marked Plaintiff's Exhibit 11.)

By Mr. France:

Q. The Gunvor was torpedoed and lost by enemy action, was it not?

A. Yes.

Mr. France: That is my case.

The Court: Well, what do you call this paper that has been marked Exhibit 11? It is one sheet, isn't it?

Mr. Postner: It should be two sheets. It is photostated so that the conditions that appear on the reverse appear on a separate photostat.

The Court: The clerk has marked only one sheet. Won't you tell him which is which?

Mr. Postner: The third and fourth.

(Discussion off the record.)

The Court: You better have them identified. I want to have this second sheet marked as part of Exhibit 11.

The Clerk: This fourth sheet is part of Exhibit 11.

[fol. 30] Mr. Postner: (After examining photostats) I am sorry, they printed them both on one side, so it is really only one sheet. I am sorry.

The Court: Then he marked the wrong sheet.

(Fourth sheet only one marked Exhibit 11.)

The Court: Well, that is the government's bill of lading?

Mr. France: Yes, your Honor.

The Court: All right, counselor. That is dated June 13th, isn't it, 1942?

Mr. France: Yes, sir.

The Court: This other paper you marked as Exhibit 11 was not the correct one. I am referring to a paper dated August 15, 1942.

Mr. France: If your Honor please, that is the plaintiff's case.

Cross-examination.

By Mr. Postner:

Q. Are you familiar with the public vouchers that are presented to collect freight? Will you look at the first two pages on this handwriting)?

A. (No answer.)

Q. Isn't that a copy of the public voucher that was put in by Alcoa or by us in order to collect the \$6,520.52 for the Gunvor freight?

A. Correct.

The Court: What is the date?

Mr. Postner: There is a stamp date, August 16, 1942. The date that this was presented.

Q. Is this the date that it was presented?

A. Yes, I guess so.

[fol. 31] Mr. Postner: It was presented either August 14th or August 16th, your Honor.

The Court: All right.

Mr. Postner: 1942.

The Court: Now how many sheets are there?

Mr. Postner: There are two.

The Court: The clerk will mark them. Are you offering them as an exhibit?

Mr. Postner: Yes.

Mr. France: Does that include the affidavit of Mr. Swartout?

Mr. Postner: Yes.

The Court: The affidavit is part of the voucher, or is it a separate document?

The Witness: It is a separate document.

The Court: Then the voucher will be marked A, and the affidavit B. Whose affidavit was it?

Mr. France: Willis H. Swartout.

Q. That affidavit was attached to the voucher when it was sent, was it not?

A. As far-as I remember it was.

The Court: Who is Mr. Swartout?

The Witness: He is an employee of Alcoa Steamship Company.

May I see that again, please?

(Marked Defendant's Exhibits A and B.)

Q. On the affidavit, Defendant's Exhibit B, there is a reference to the government bill of lading number, which is Plaintiff's Exhibit 11, I believe; is that correct?

A. Well, I would have to see that.

[fol. 32] Q. It is in there. It is the next page.

A. That is correct.

Q. Now will you also look at the second entry on the affidavit of Mr. Swartout, Defendant's Exhibit B, and will you read that?

A. That is the original bill of lading covering this (indicating).

Q. No, I am sorry (indicating).

A. Carrier's bill of lading M2209.

Q. Now what does that reference mean?

A. Well, it means, if I recollect back to 1942, we also made for our own purposes our own commercial bill of lading on these shipments. We had a series of numbering bills of lading, and that would be our series of numbering bills of lading.

Q. And whether you issued it or not, you at least prepared one?

A. That is right.

Q. Is it possible to get that bill of lading?

A. That I don't know.

Q. Will you tell me whether this blank form of bill of lading, Plaintiff's Exhibit 10, would be the form of bill of lading used and referred to in the affidavit?

A. Yes, because this was printed in December, 1941, and this shipment was in June, 1942.

Mr. Postner: There is no objection now to this blank form, and that is the end of my cross examination.

The Court: Well, it is in. It has been marked Plaintiff's Exhibit 10.

Is that your case?

Mr. France: Yes.

The Court: Plaintiff rests?

Mr. France: Yes.

[fol. 33]

MOTION TO DISMISS

Mr. Postner: At this time I would like to move only on the jurisdictional ground. As I pointed out in my brief, there is a case by Judge Hulbert against me, and since then I have made a search and I find it is sufficiently reported in the Advance Sheets.

The Court: I am going to reserve decision on the question of jurisdiction until I have time to look into it. So as far as that motion is concerned decision reserved. What is the citation?

Mr. Postner: 75 Fed. Supp. 110. In my brief I gave you the American Maritime cases.

The Court: All right. Now the defendant's proof.

DEFENDANT'S CASE

Mr. Postner: My case is all documents, and the plaintiff has introduced them all.

The Court: Anything you wish to add? If there are any you may offer them now.

Mr. Postner: I am just about to rest, with one little document here, and that is certified, but I don't know whether it is evidence or not. I found it very helpful.

The Court: If it is duly certified and it relates to this matter show it to your opponent.

Mr. Postner: You can see that in one page is related what took place here. It is called a statement of settlement of claim issued by the Comptroller-General, and it will show on that one page what took several paragraphs—

The Court: All right, show it to your opponent. You offer it in evidence?

Mr. Postner: If there is no objection.

The Court: Prepared in the Comptroller-General's office.

[fol. 34] Mr. Postner: The original was, yes.

The Court: What is the date of it?

Mr. Postner: February 2, 1946.

Mr. France: Well, it goes before you. It might be a little different under ordinary circumstances. This is behind the scenes—this shows what was going through the Comptroller-

General's mind and not what he submitted to us, but for what it is worth—

The Court: All right, it is received.

(Marked Defendant's Exhibit C.)

The Court: All right. That is, really dated January 30, 1946, isn't it? This paper?

Mr. Postner: There is a stamped date on the front of it, February 2, 1946. That is the one I took. Very faintly, up in one of these little boxes.

The Court: All right. Exhibit C. What else?

Mr. Postner: Now, your Honor, the testimony shows that the Gunvor shipment was made, Mr. Cole testified that the vessel was sunk—

The Court: By enemy action.

Mr. Postner: —by enemy action, and that is admitted in the reply anyway. I might make it plain we are not suing for the loss of the cargo; it is only the freight that we paid. The freight is shown by this voucher which has been put in evidence as Defendant's Exhibit A. I believe whether that payment was erroneous or illegal and binding on the government are questions of law for your Honor, so the defendant rests.

The Court: Any rebuttal?

[fol. 35] Mr. France: No, sir, but I would like a little while to reply to the brief that Mr. Postner has given me.

The Court: Have you exchanged your briefs?

Mr. France: Yes, sir, we have.

The Court: The main briefs have been exchanged. Now how much time do you need?

Mr. France: About a week or ten days.

The Court: All right, April 12th, ten days.

Now here is what I want you to do: on April 12th you will exchange answering briefs and serve ~~proposed~~ findings of fact and conclusions of law. Now I will give you three days after that, to April 15th, for reply briefs and any criticism of your opponent's proposed findings of fact and conclusions of law.

All right. Decision reserved.

[fol. 36]

In United States District Court**FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION**

This cause having been tried on April 2, 1948, and the Court having heard the evidence and arguments of counsel and considered their briefs, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The plaintiff at all the times herein referred to was a corporation duly organized and existing under the laws of the State of New York, with its office at No. 17 Battery Place, Borough of Manhattan, City and State of New York. The defendant is a sovereign.

2. The plaintiff carried on its vessels at the request of and for the defendant certain consignments of lumber as follows:

1. On the SS. Plow City, in and about January 1942, from St. Joe, Florida, to Port of Spain, Trinidad, B. W. I., 1,150,768 feet of lumber.

2. On the SS. Alcoa Trader, in and about November, 1941, from Tampa, Florida, to Port of Spain, Trinidad, B. W. I., 87,113 feet of lumber.

The said shipments were duly delivered to the defendant at Port of Spain, Trinidad, B. W. I.

The freight charge for the foregoing shipments was \$24,453.83 for the shipment on the SS. Plow City, and \$17,788.65 for the shipment on the SS. Alcoa Trader.

[fol. 37] 3. Those amounts were billed by the plaintiff to the defendant (represented by the War Department, Finance Officer, U. S. Army, Washington, D. C.) on the prescribed "Public Voucher for Transportation of Freight or Express," and thereafter the said sums were paid by the defendant to the plaintiff; \$24,453.83 on or about March 25th, 1942, and \$17,788.65 on or about March 19th, 1942. (Exhibits annexed to complaint.)

4. Thereafter the plaintiff presented to the defendant a bill for freight, for cargo, other than the foregoing, carried by the plaintiff from New York to Port of Spain, Trinidad, in the amount of \$23,137.79. On the 11th day of

January, 1945, the Comptroller General of the United States allowed \$22,779.44 of said sums, and then deducted from said allowance of \$22,779.44 (1) an item of \$4,890.77, claimed to be an overpayment in that amount of the freight theretofore and on or about March 25th, 1942, paid to the plaintiff for the aforesaid shipment of cargo on the SS. Plow City and (2) an item of \$3,557.73, claimed to be an overpayment in that amount of the freight theretofore and on or about March 19th, 1942, paid to the plaintiff for the aforesaid shipment of cargo on the SS. Alcoa Trader. (Ex. 1.)

5. The basis of the foregoing deduction for overpayment made by the Comptroller General was that the prevailing tariff did not permit a surcharge of 25%, which had been incorporated in the aforesaid freight bills for cargo carried on the SS. Plow City and SS. Alcoa Trader, respectively.

6. On December 18, 1944, the General Accounting Office notified plaintiff (Ex. 2) that it would give consideration to any material evidence which the plaintiff might offer to sustain the validity of the said surcharge of 25%.

[fol. 38] 7. On February 16, 1945, the plaintiff did submit such evidence and support for the validity of the 25% surcharge (Ex. 3) and thereafter in August, 1945, the Comptroller General indicated that he would consider applications for the refund of said items of \$4,890.77 and \$3,557.73 deducted as aforesaid on January 11, 1945.

8. On or about January 9th, 1946, the plaintiff did file its claims (Exs. 4 and 5) with the Comptroller General for refunds of the said sums of \$4,890.77 and \$3,557.73.

9. On February 2, 1946, the Comptroller General advised the plaintiff of his disposition of the two said claims for refund as follows (Ex. 6):

Amount claimed	\$8,448.50
Amount allowed	\$4,927.98
Difference	\$3,520.52

Bill G-534, Voucher 329413, 3/42 W. M. Dixon B/L
WE-231286, 11/17/41

Alcoa Steamship Co., Inc., New York office.

Paid \$14,230.92 Should be \$17,788.65 due carrier
\$3,557.73.

Bill G-639, Voucher 357409, 3/42, W. M. Dixon, B/L
WE-298987 1/1/42

Port of St. Joe, Fla., to Port of Spain, Trinidad,
B. W. I.

Alcoa Steamship Co., Inc., New York office.

Paid \$19,563.06 Should be \$24,453.83 due carrier
\$4,890.77.

Deduction

[fol. 39] Bill G-1247, Voucher 295647, 9/42, J. P. Till-
man, B/L WE-310320 6/13/42

Mobile, Alabama to Port of Spain, Trinidad, B. W. I.

Paid \$3,520.52 Should be Nil Overpaid \$3,520.52

The government bill of lading on which the property was shipped contemplated payment upon presentation of said bill of lading showing delivery at destination. The bill of lading does not show delivery as contemplated and the record does not establish any requirement for payment otherwise. Consignee's Certificate of Delivery states "S.S. Gunvor has been lost due to enemy action".

10. The aforesaid deduction of \$3,520.52 was for freight money paid to the plaintiff September 15, 1942 (Ex. 7), for a shipment of government cargo of lumber on the S.S. Gunvor from Mobile, Alabama, to Port of Spain, Trinidad, for which there was issued a "government bill of lading" dated June 13th, 1942 (Ex. 9) which provided in part as follows:

General Conditions and Instructions

Conditions

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from [fol.40] consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

Instructions

2. Shipping order, original bill of lading, and memorandum bill of lading should be used in making a shipment. Only one original bill of lading will be issued for a single shipment. The shipping order should be furnished the initial carrier. The original bill of lading and memorandum copies should be signed by the agent of the receiving carrier, returned to the consignor, and the original promptly mailed to the consignee. The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. Memorandum copies of bills of lading may be used as administrative officers direct.

4. In no case will a second bill of lading be issued for a shipment, nor will a bill of lading be issued after the [fol. 41] transportation has been performed. In case the bill of lading has been lost or destroyed, the carrier shall be furnished by the consignee with a "Certificate in Lieu of Lost Bill of Lading," on the standard form prescribed therefor which when finally consummated by acknowledgment of the "Certificate and Waiver by Transportation Company", shall accompany the bill for services submitted by the carrier to the officer charged with the settlement of the account. Should the original bill of lading be located after settlement has been made on the certificate, it will be forwarded to the administrative office of the department concerned for transmittal to the General Accounting Office.

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6. In case of loss or damage to property while in the possession of the carrier, such loss or damage shall, when practicable, be noted on the bill of lading or certificate in lieu thereof, as the case may be, before its

accomplishment. All practicable steps shall be taken at that time to determine the loss or damage and the liability therefor, and to collect and transmit to the proper officer, without delay, all evidence as to the same. Should the loss or damage not be discovered until after the bill of lading or certificate has been accomplished, the proper officer shall be notified as soon as the loss or damage is discovered, and the agent of the carrier advised immediately of such loss or damage, extending privilege of examination of shipment.

11. The form of Consignee's Certificate (foot of Ex. 11) referred to in paragraph 2 of the "Instruction" in government's bill of lading is as follows:

[fol. 42] Consignee's Certificate of Delivery

I have this day received from _____ (name of transportation company) at _____ (actual point of delivery by carrier) the public property described in this bill of lading, in apparent good order and condition, except as noted on the reverse hereof. Delivery service at destination was/was not by the Government.

Weight pounds
(in words) (in figures)

(Consignee) (Date)

12. The usual form of the plaintiff's bill of lading (Ex. 10) in use at the time of the said shipment of cargo on the SS. Gunvor provided as follows:

3. The Goods, whether perishable or not, are accepted by the Carrier subject to delays or default in shipment, transportation, delivery or otherwise occasioned by war, rebellion, riots, strikes, stoppage of labor, lockouts or labor troubles of Carrier's employees or others; shortage of labor, fuel, conveyances or room; lack of facilities of any sort; accumulation of cargo; weather, ice; or any conditions, whether or not of a like kind to those herein stated, not shown due to Carrier's fault; and notice to shipper or others of any danger of such delay or default is hereby waived; and

the Carrier shall not be responsible for any such delay or default; and if loading of the Goods in the customary manner is delayed, or the Vessel is likely to be detained [fol. 43] she may proceed without loading or completing the loading of the Goods.

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6. Full freight to destination, whether intended to be prepaid or collected at destination, and all advance charges against the Goods are due and payable to ALCOA STEAMSHIP COMPANY, INC., as soon as the Goods are received for purposes of transportation; and the same and any further sums becoming payable to the carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid). Goods or Vessel lost or not lost, or if the voyage be broken up; and the same shall be payable in lawful money of the United States; and the Carrier shall have a lien on the Goods therefor (whether payable in advance or not and though noted hereon as prepaid); and said lien shall not be waived even though the goods are delivered to a carrier, or landed on the pier, or placed in storage; and in case of loss of any part of the Goods, the Carrier shall have a lien on the Goods or any part or proceeds for the whole thereof; and the shipper, consignees and/or assigns shall be jointly and severally liable therefor, and notwithstanding any lien therefor has been surrendered.

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[fol. 44] 30. It is mutually agreed, that in addition to the other terms and conditions of the bill of lading which shall be deemed affected only so far as inconsistent herewith, this shipment is at the sole risk of the owners thereof, of all risks of war, preparations for war, arrest, restraint, capture, seizure, destruction, detention, sinking by explosive mines, torpedoes, or other-

wise, interference or hostilities on the part of any Power and of all consequence thereof and the vessel shall have liberty in the discretion of the master, owner or any agent or charter thereof to proceed notwithstanding any such risks: * * *

13. While on her voyage carrying the aforesaid government shipment of lumber, the SS. Gunvor was lost due to enemy action, June 14, 1942.

14. On or about the 15th day of September, 1942 the War Department, U. S. A. paid the plaintiff the aforesaid freight monies in the sum of \$3,520.52 (Exs. A & B; Ex. 7).

15. On or about July 24th, 1944, the Comptroller General, referring to the payment of the aforesaid sum of \$3,520.52 as "overpayment", advised the plaintiff as follows (Ex. 8):

"In the audit of your bill described above an overpayment has been noted as explained below.

"Pursuant to Sec. 322 of the Transportation Act, 1940, 54 Stat. 955, a deduction will be made from an amount otherwise due your company unless the amount thus overpaid is refunded within sixty (60) days,—check to be made payable to 'The United States' and mailed direct to this office."

[fol. 45] 16. On February 2, 1946 the Comptroller General deducted (Ex. 6) the aforesaid sum of \$3,520.52 (freight paid on the SS. Gunvor shipment) from a sum of \$8,448.50 found due to the plaintiff as balance of freight on shipments on the SS. Plow City and SS. Alcoa Trader.

17. The defendant has neglected and refused to pay the plaintiff the said sum of \$3,520.52, although duly demanded.

18. This action was commenced July 10, 1946 by the filing of the complaint in the office of the Clerk of this Court.

CONCLUSIONS OF LAW

I. This Court has jurisdiction of the subject matter of this action under T. 28 U. S. C. §41(20).

II. This cause of action arose February 2, 1946. The action is not barred by any Statute of Limitations.

III. That the plaintiff is entitled to recover from the defendant the sum of \$3,520.52.

IV. That the Set-Off and Counterclaim of the defendant for the sum of \$3,520.52 should be dismissed.

V. Let judgment be entered accordingly.

Dated, April 30, 1948.

Vincent L. Leibell, United States District Judge.

[fol. 46] IN UNITED STATES DISTRICT COURT

OPINION

LEIBELL, D. J.:

The facts set forth in the above findings warrant the conclusion that the sum of \$3,520.52 was illegally withheld by the Comptroller General on February 2, 1946 as a set-off against freight admittedly due for shipments on the SS. Plow City and the SS. Alcoa Trader. The set-off represented a sum which had theretofore been paid by the Comptroller General to the plaintiff as freight on a shipment of lumber on the SS. Gunvor, owned and operated by the plaintiff, which was lost through enemy action on June 14, 1942. The legal question presented involves the interpretation of the provisions of the government bill of lading and of the bill of lading of the carrier. The rules and conditions of the carrier's bill of lading were incorporated into the government's bill of lading by reference, "unless otherwise specifically provided or otherwise stated on" the government's bill of lading.

The carrier's bill of lading contained the customary provision that the freight was to be deemed fully earned and due and payable—goods or vessel lost or not lost—whether freight was to be prepaid or to be collected at destination. If there is nothing in the government's bill of lading, specifically providing to the contrary, i. e., that the freight shall not be earned and due and payable if the goods or vessel are lost, then the sum of \$3,520.52 was improperly deducted by the Comptroller General.

The government contends that the provisions in paragraph 1 of the conditions and in paragraph 2 of the instructions, on the back of the government's bill of lading, are so clearly inconsistent with the provisions of paragraph 6 of the terms printed on the back of the carrier's bill of

[fol. 47] lading (all of which are quoted in the findings) as to bar the carrier from any claim for freight on any shipment which was not delivered at destination, even though delivery was made impossible through the destruction of the carrier's vessel by enemy action.

I am of the opinion that the aforementioned provisions of the bills of lading are not inconsistent. The provisions of its own bill of lading, cited by the government, have to do with the "evidence" that must be presented by the carrier to collect freight showing delivery to the proper person when delivery of the shipment has been made. The provisions of the carrier's bill of lading, which declares that the freight is payable "goods or vessel lost or not lost", covers the liability of the shipper for freight if there is no delivery at all because the goods have been destroyed through no fault of the carrier. The two provisions can thus be given effect in respect to the situations to which they apply: the one where there is a delivery of the shipment; the other where the shipment is lost.

A bill of lading is "accomplished" not by transportation of the shipment to its destination. Something more is required; the delivery at destination must be made bona fides to the person apparently having the right to receive the shipment.

The word "accomplished" when used in association, with the term "bill of lading" has had a meaning in mercantile circles which goes back to the time when a bill of lading was prepared and signed in a set. It was customary to insert in bills of lading drawn in sets the provision that one of them "being accomplished, the others to stand void". The duty devolved on the master to make delivery to the rightful owner and if he had no knowledge that any other part [fol. 48] of the bill of lading, other than the part presented had been indorsed, he could "properly and safely deliver in accordance with the indorsement and holding of the part presented, without inquiry as to the other". *Carrier on Carriage of Goods by Sea*, Sec. 2. "If upon one of them the shipowner acts in good faith, he will have 'accomplished' his contract, will have fulfilled it, and will not be liable or answerable upon any of the others". *Glyn v. East & West India Dock Co.* (1882), 7 A. C. 591 at p. 599 cited in Sec. 55. See *G. H. M. Thompson*, "Bills of Lading" p. 211, where he uses the word "executed" as meaning the same

thing as "accomplished"—"One bill being executed, the others to be void". See also *Leggett*, "*Bills of Lading*" p. 569; and *Duckworth*, "*Charter Parties and Bills of Lading*" page 74.

The government bill of lading in the case at bar was not drawn in the form of a set. Paragraph 2 of the Instructions on the back of the bill of lading directed that a "Shipping order, original bill of lading, and memorandum bill of lading should be used in making a shipment". That paragraph also stated that "Only one original bill of lading will be issued for a single shipment". The paragraph then goes on to state what shall be done with the documents: the shipping order shall be furnished the initial carrier; the original bill of lading and memorandum copies shall be signed by the agent of the receiving carrier, returned to the consignor and the original promptly mailed to the consignee. Then, "the consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the services will be paid".

[fol. 49] It is clear that the government did not intend to pay on presentation of any of the memorandum copies of the bill of lading; they were to be "used as administration officers direct". The government required presentation of the original bill of lading, with the consignee's certificate duly signed. To meet a situation where the original bill of lading was lost or destroyed, paragraph 4 of the Instructions provided that the carrier shall be furnished by the consignee with a "Certificate in Lieu of Lost Bill of Lading", on the standard form prescribed therefor "which when finally consummated by acknowledgment of the 'Certificate and Waiver by the Transportation Company' shall accompany the bill for services submitted by the carrier to the officer charged with the settlement of the account".

The words "accomplished" and "accomplishment", in relation to the bill of lading, appear in paragraph 6 of the Instructions on the government's bill of lading, which deals with loss or damage to property while in the possession of the carrier. Paragraph 6 provides that "such loss or damage shall when practicable, be noted on the bill of lading or certificate in lieu thereof, as the case may be before its accomplishment". But "should the loss or damage not

be discovered until after the bill of lading or certificate has been accomplished, the proper officer shall be notified as soon as the loss or damage is discovered * * *

If the government wanted to negative the provisions of paragraph 6 of the terms of the carrier's bill of lading, in relation to the payment of freight "Goods or vessel lost or not lost", it could have done so in a single sentence by providing that no freight shall be payable if the shipment is lost. The government prepared the form of its own bill of lading. If it is indefinite or ambiguous, that is not the [fol. 50] fault of the plaintiff. If it permits of more than one interpretation, the plaintiff is entitled to the more favorable interpretation.

The question of the right of a carrier to payment of freight where the cargo is lost with the destruction of the vessel or where the carrier is unable to present a bill of lading properly accomplished, was before the Comptroller of the Treasury during the First World War. In Volume 24, Decisions of the Comptroller of the Treasury, p. 707 (May 27, 1918) it was held that the liability of the government for freight charges would arise "when the shipment is actually made, whether delivered to destination or lost with the destruction of the vessel". On April 7, 1942 the Comptroller General rendered an opinion to the Secretary of the Navy (Vol. 21 D. C. G., p. 909) in which he held that where the carrier claimed charges without being able to present evidence of delivery, it could be required to show the facts and circumstances it relied upon as relieving it from the duty "to effect delivery and to obtain, receipt from the consignee". There are decisions of the Comptroller General in December 1942 and subsequent thereto refusing payment of freight where the goods shipped were lost by enemy action and so not delivered at destination. But there do not appear to have been any to that effect in June 1942 or prior thereto. The SS. Gunvor was lost June 14, 1942. The payment of freight on the shipment of lumber on the SS. Gunvor was made September 15, 1942. When the plaintiff received the shipment on the SS. Gunvor in June 1942, it was entitled to rely on the prevailing interpretation of these bills of lading provisions in relation to payment of freight, where the vessel is lost.

There is nothing unusual or unconscionable about the provisions of paragraph 6 of Alcoa's bill of lading. Al- [fol. 51] through the common law rule was that freight

was earned only if the shipment was delivered (*The Louise*, 58 F. Supp. 445), nevertheless for many years bills of lading have contained the provision that freight was considered earned, vessel lost or not lost. And such provisions have been upheld where the loss was not due to the negligence of the carrier. *Allanvilde Transport Corp. v. Vacuum Oil Co.*, 248 U. S. 377, p. 385. The government knew of this practice when it prepared its own form of bill of lading, standard form No. 1059, approved by the Comptroller General August 24, 1928.

In *Quarrington Court*, 122 F. 2d 266 at p. 268 the Circuit Court of Appeals, this Second Circuit held that:

"The provision that freight was payable on destination at outturn weight does not override the provision that it is to be paid regardless of the loss of the ship."

The provision as to payment destination at outturn weight and the provision as to payment on presentation of the bill of lading properly accomplished are of almost equal significance. If the one was held not inconsistent with a provision that freight was payable regardless of the loss of the ship, the other should receive a similar interpretation.

In construing the provision of the bills of lading in relation to the shipment on the SS. Gunvor we may take judicial notice of the fact that in June 1942 there was real danger of loss of the vessel in the Caribbean due to the activity of enemy submarines. The bill of lading of the carrier contained a war clause (par. 30) to the effect that "this shipment is at the sole risk of the owners thereof, of all risks [fol. 52] of war" including "sinking by exploding mines, torpedoes, or otherwise". The government needed the lumber shipped on the SS. Gunvor in the construction of war bases at Trinidad. The carrier was willing to undertake the carriage in an area of war activity. If the carrier was to be deprived of its rights under the clause that freight was payable "Goods or vessel lost or not lost", that should have been clearly and specifically stamped thereon or stated in the government's printed bill of lading, as it did in paragraph 7 of the printed conditions of the government's bill of lading in respect to the rules and conditions governing commercial shipments as to the period within which notice of claim shall be given the carrier and suit instituted.

Plaintiff brings this suit under the Tucker Act, 28 U. S. C. § 41(20), which provides in part:

"Section 41. Original jurisdiction. The district courts shall have original jurisdiction as follows:

Concurrent with the Court of Claims, of all claims not exceeding \$10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands [fol. 53] whatsoever on the part of the Government of the United States against any claimant against the Government in said court; * * *"

The government contends that the action should have been brought under the Suits in Admiralty Act, T. 46 U. S. C. § 742, arguing that the bill of lading was a maritime contract and related to a cargo owned by the United States. A similar question was before Judge Hulbert in *American President Lines v. United States*, 75 F. Supp. 140, and he held that this Court had jurisdiction under 28 U. S. C. § 41(20), and that the claim was not one contemplated by the Suits in Admiralty Act. I agree with his conclusion, for the reasons stated therein and the decisions cited to support it.

The defendant is urging that this Court's sole source of jurisdiction to hear plaintiff's claim is under the Suits in Admiralty Act and that therefore the complaint herein should be dismissed because of the two year statutory limitation on actions brought under the Suits in Admiralty Act. Assuming arguendo, that only a court of Admiralty has jurisdiction of plaintiff's claim, if the action were transferred to the Admiralty side of this court, the two year statute would not bar it, since the claim arose on February 2, 1946, when the illegal deduction of \$3,520.52

was made by the Comptroller General. What the defendant seeks is a dismissal of the action, requiring the institution of a new suit, one under the Admiralty Act, which might furnish some basis for a defense of the statute of limitations.

It is unnecessary to transfer this suit to the Admiralty Calendar. The action is founded upon a contract for carriage of the shipment by a private vessel as evidenced by [fol. 54] the bill of lading. The fact that the government owned the cargo does not make this a claim to which the Suits in Admiralty Act applies. The Suits in Admiralty Act substituted a libel in personam for a libel in rem where a government owned merchant vessel or cargo might otherwise be subject to an in rem proceeding. The cargo that was carried on the SS. Cunvor was completely lost and the cargoes carried on the SS. Plow City and SS. Alcoa Trader were delivered. No in rem proceeding could be brought against any of those cargoes. No proceeding in rem could have been brought, if the cargo had been privately owned, at the time this action was commenced. (See § 742 of T. 46 U. S. C. A.) Any lien on the cargo for freight is relinquished by delivery of the cargo. *Eastern Transportation Co. v. United States*, 159 F. 2d 349.

The claim here is based on the action of the Comptroller General in unlawfully withholding a sum due for freight. It is also founded upon a law of Congress (Sec. 322 of the Transportation Act, T. 49 U. S. C. § 66) which provides:—

“§ 66. Government traffic; payment for transportation; deduction of overpayments.

Payment for transportation of the United States mail and of person or property for or on behalf of the United States by any common carrier subject to chapters 1, 8 and 12 of this title, as amended, or chapter 9 of this title, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier. Sept. 18, 1940, c. 722, Title III, § 322, 54 Stat. 955.”

[fol. 55] The action of the Comptroller General, as his notice of July 24, 1944 stated, was taken “pursuant to Sec.

322 of the Transportation Act" [T. 49 U. S. C. § 66]. The claim of plaintiff arose as a result of that action. The Supreme Court has held that there is no distinction between claims "arising under" and those "founded upon" a law of the United States. *United States v. Emery*, 237 U. S. 28. See also *Carriers Inc. v. United States*, 106 F. 2d 707.

For the reasons hereinabove stated I have concluded that this court has jurisdiction of this claim under the Tucker Act and that the plaintiff is entitled to judgment on the merits for the amount claimed.

Dated, April 30th, 1948.

Vincent L. Leibell, United States District Judge.

[fol. 56] IN UNITED STATES DISTRICT COURT

JUDGMENT—May 14, 1948

This cause came on to be heard on April 2, 1948, and was argued by counsel and thereupon, upon consideration thereof, and on the Court's written opinion with Findings of Fact and Conclusions of Law, Filed on May 3, 1948, it is ordered, adjudged and decreed that the plaintiff recover from the defendant the sum of \$3,520.52, and that the Set-off and Counterclaim of the defendant for \$3,520.52 be dismissed.

Dated: May 14th, 1948.

Approved.

Vincent L. Leibell, U. S. D. J.

[fol. 57] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the judgment entered in this action on May 14, 1948, which ordered, adjudged and decreed that plaintiff recover from the defendant the sum of \$3,520.52 and that the set-off and counter-claim of the defendant for \$3,520.52 be dismissed, and said defendant hereby appeals from each and every part of the said judgment.

Notice is further given that upon the said appeal from the said judgment, defendant will likewise appeal from the denial of its motion made during the trial to dismiss the complaint for lack of jurisdiction.

Dated, July —, 1948.

John F. X. McGohey, United States Attorney, Attorney for Defendant, Office & P. O. Address, 45 Broadway, Borough of Manhattan, City of New York.

[fol.58] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT

[Title omitted]

STIPULATION AS TO EXHIBITS

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein as follows:

1. That plaintiff's exhibit 1, which is the Comptroller General's Return, need not be printed in full, but that the first page of the said exhibit, one paragraph on page 5, one paragraph on page 6 and a part of one of the paragraphs on page 7 shall be printed.

2. That plaintiff's exhibit 10, which is Alcoa Steamship Company's regular form bill of lading, need not be printed in full, but that the clauses numbered 3, 6, and 30 of the said bill of lading shall be printed.

3. That defendant's exhibit C, which is a notice of the Comptroller General and which is substantially similar to plaintiff's exhibit 6, need not be printed.

[fol. 59] 4. That, except as above provided, all exhibits shall be printed in full.

5. That exhibits or parts of exhibits not printed may be produced and used on the argument on appeal with the same force and effect as if the same had been printed.

Dated: New York, New York, 1949.

John F. X. McGohey, United States Attorney, Attorney for Defendant-Appellant. Wood, Molloy, France & Tully, Attorneys for Plaintiff-Appellee.

[fol. 60] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated that the foregoing is a correct transcript of the record of the District Court of the United States for the Southern District of New York in the above entitled matter and that the Clerk may certify the same as the record on appeal.

Dated: New York, January —, 1949.

John F. X. McGohey, United States Attorney, Attorney for Defendant-Appellant. Wood, Molloy, France & Tully, Esqs., Attorneys for Plaintiff-Appellee.

[fol. 61] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 62] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT; OCTOBER TERM, 1948

No. 257

(Argued May 6, 1949. Decided June 29, 1949)

Docket No. 21319

ALCOA STEAMSHIP COMPANY, INC., Appellee,

v.

UNITED STATES OF AMERICA, Appellant

Before L. Hand, Augustus N. Hand and Frank, Circuit Judges

On appeal by the United States from a decree of the District Court for the Southern District of New York, granting a recovery under the Tucker Act* for money earned as freight.

Leavenworth Colby for the appellant.

Melville J. France for the appellee.

L. DeGrove Potter and Walter P. Hickey filed a brief as amici.

* § 1346 (A-2), Title 28, U. S. C.

L. HAND, Circuit Judge:

The question in the case is whether the United States overpaid the freight due to the petitioner, Alcoa Steamship Company, Inc., upon a cargo of lumber shipped upon the petitioner's ship, "Gunvor." The United States paid the agreed freight on the cargo in question, but later deducted the same amount from other freights, concededly due the petitioner upon other shipments; and it has sued to recover the deduction. The facts out of which the claim arises are as follows: On June 13, 1942, the "Gunvor," at Mobile lifted a cargo of lumber bound for Trinidad under a "government form" bill of lading; and on the first day out she was sunk by enemy action and she and her cargo became a total loss. In spite of the carrier's failure to complete the voyage, the United States paid the freight on September 25, 1942, and the only issue is whether the freight had been earned. That concededly depends on the proper reading of the bill of lading, the important passages in which were the first of seven "Conditions" and the second of seven "Instructions," all upon the back of the bill. The first "Condition" was as follows:

"Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face thereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specified."

The second of the seven "Instructions," so far as it is important here, was as follows: "The consignee on receipt [fol. 64] of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made." The "consignee's certificate" was a "certificate of delivery" spread on the face of the bill, which declared that the consignee had received the goods; but in the case at bar, in place of such a declaration, the following words were substituted: "SS. 'Gunvor' has been lost due to enemy action." The consignee—the District Engineer, United

States Engineers Office, Port of Spain, Trinidad—signed the certificate so altered on August 8, 1942; and freight was paid, when the carrier presented the bill of lading, after receiving it from the District Engineer so endorsed.

The United States relies upon these documents, taken in conjunction with the well-settled law that freight is never earned until the cargo is delivered.* The carrier answers that the bill of lading had incorporated by reference the carrier's "usual form" of bill of lading which provided that "full freight to destination, whether intended to be prepaid or collected at destination" is "due and payable . . . as soon as the Goods are received for purposes of transportation; and the same . . . shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading, of the service hereunder, without deduction (if unpaid). Goods or vessel lost or not lost. . . ." That is the customary stipulation in bills of lading; and the language alleged to incorporate it into the government bill is the second of the "Conditions," which was as follows: "Unless otherwise specifically provided or otherwise stated therein, this bill of lading is subject to the same rules and [fol. 65] conditions as govern commercial shipments made on the usual forms provided therefor by the carrier." The first issue is whether the language quoted from the first "condition" "specifically provided" "otherwise" than that "full freight . . . should be due and payable . . . as soon as the Goods are received for purposes of transportation." The Comptroller-General had ruled in April, 1942, when certain consignees in the Philippines could not be found because of war conditions, but, when the goods were in fact delivered at destination, that the freight had been earned, although obviously the carrier had not performed the first "Condition" to the letter. On the other hand the petitioner had had warning from the same official that in the circumstances here in question recovery was still an open question. We do not think that the administrative rulings should have any substantial weight in our decision.

It will be noted that the carrier's "usual form" provided that full freight should become "due and payable" as soon as it received the goods "for purposes of transportation," which would mean that the United States would become

* *The Gracis D. Chambers*, 248 U. S. 387.

liable for the entire freight, not when the ship lifted the lumber, but even from the moment it came into the carrier's possession. In order to construe the first "condition" consistently with such a result, we must first read the words: "Prepayment of charges shall in no case be demanded," as referring only to the time when the carrier may ask for payment, and not as imposing any condition upon the obligation itself. True, the "usual form" covered, not only situations in which freight was "intended to be prepaid," but those in which it was to be "collected at destination"; but it appears to us, even though the words we have just quoted from the "Condition" stood alone, that it would be very unnatural to construe them as applying only to the [fol. 66] time of payment of an absolute obligation. We can see no reason why the United States—which drew the bill—should wish to defer the payment of a claim which it must inevitably pay at some time. It was not, like a private person, in need of any extension of its credit. Why, if the freight was earned upon mere delivery, should it be interested in postponing its collection? However, the words did not stand alone, and those that immediately followed prove that, at least in one important respect, the substance of the obligation was changed. The sentence went on to say that no "collection shall be made from the consignee," and that deprived the carrier of its ancient lien for freight. It must give up the goods to the consignee upon getting his signature to the "certificate of delivery," and receiving from him the bill so signed. Only then did the bill of lading, "properly accomplished," become "the evidence upon which settlement for the service will be made." The petitioner seeks to limit these conditions to cases where the goods have in fact been delivered to the consignee. We cannot agree. As we have said, the denial to the carrier of its lien for freight had nothing to do with the time of payment; and to interpolate into the other language the necessary limitation appears to us gratuitous and quite unwarranted. Rather we think that the "Condition" and the "Instruction" together constitute a carefully devised plan by which the United States, not only asserted the privilege of any shipper under the admiralty law that it should not pay for what it does not get; but went even further by depriving the carrier of one of its best established privileges. Nor is this result unjust to, or hard upon, the petitioner. The law throws upon all carriers the risk of performance, for

performance is a condition upon the shipper's promise to pay, just as performance is always a condition upon pay-[fol. 67] ment in any contract of service. True, it has become general for carriers to reverse this, and throw the risk upon the shipper; but, although we do not know why this has happened, surely there is ground for supposing that it may have been because of the carrier's superior bargaining position. So far as it has become a well settled custom, the burden may be distributed by insurance with that as a datum; but it was not unnatural for the United States, if its own insurer, to wish to have the privileges which the law gives to shippers in general.

The second point on which the United States relies is that statute * which provides that "in all cases of contracts for the performance of any service . . . payment shall not exceed the value of the service rendered." Did this forbid the United States to deliver any goods to a carrier under a bill of lading of the "usual form"? Maybe not; it is at least plausible to say that, if the industry concerned accepts mere delivery of the goods to the carrier as a service whose "value" is the whole freight, and throws upon the shipper the risk of performance, and if no provision to the contrary is made by the parties, delivery is a "value" which will satisfy the statute. Nor in that event would it be an "advance of public money," if the United States, as shipper, paid the freight when the carrier accepted the goods. However, since in the case at bar the parties did specifically provide to the contrary by declaring what the services should be on which payment depended, we may leave the question unanswered.

Decree reversed; petition dismissed.

[fol. 68]

DISSENTING OPINION

AUGUSTUS N. HAND, Circuit Judge (Dissenting):

The bill of lading issued by Alcoa Steamship Company, Inc., clearly provided for the payment of freight whether or not the vessel was lost. Such a provision now general in commercial bills of lading must govern "unless other-

* § 529, Title 31, U. S. C.

wise specifically provided or otherwise stated" in the government bill of lading. In other words, the company bill of lading should prevail unless clauses in the bill of lading prepared by the government, and therefore to be construed against it in resolving any ambiguities, "specifically" have provided otherwise. I do not think that the clauses in the government bill of lading have "specifically" provided otherwise. At best, they seem ambiguous and in fact to fall short of any clear provision that in terms relieves the government from the precise exemptions in the carrier's bill of lading.

I cannot see that the general maritime rule that freight is not earned until cargo is delivered has anything to do with such a situation as we have here. That rule does not apply to cases where there is an agreement to the contrary. *Allandwilde Transport Corp. v. Vacuum Oil Co.*, 248 U. S. 377; *International Paper Co. v. The Gracie D. Chambers*, 248 U. S. 387. Nor do I see that the provisions of Condition 1 or Instruction 2 control the case at bar. Instruction 6 says that: "In case of loss or damage to property while in the possession of the carrier, such loss or damage shall, when practicable, be noted on the bill of lading or certificate in lieu thereof, as the case may be, before its accomplishment." Condition 1 and Instruction 2 relate only to the mode of settlement when the freight has been delivered. Instruction 6 apparently deals with a case where there has been partial delivery, and seems to involve the assumption that there may be instances where there is a partial loss for which freight [fol. 69] charges may be collected under the terms of the commercial bill of lading. Instruction 6 does no more than require a notation of such a partial loss on the government bill of lading and contains nothing to indicate that such partial loss would prevent the bill of lading from being "properly accomplished."

I am not convinced that there was no reason for the provision in Condition 2 that "prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee," unless it was intended that freight charges were never to become due except in the event of the successful completion of the voyage. The government may have had financial reasons for barring prepayment of charges and for only allowing collection from itself rather than from the consignee, and I see no reason for supposing

that it was indifferent to the financial benefits it might obtain through a delay in payment. The agreement that freight charges were to be paid only after delivery in cases where the voyage had been successfully accomplished did not in terms affect the substantive right of the carrier to earn and ultimately to receive the freight, and related only to time of payment. It is true that the clause presupposes the loss of the carrier's lien because the latter was bound to deliver the cargo, in the absence of excusable loss, and to look only to the government for payment. But the loss of a lien was quite unimportant when the government was the obligor.

For the foregoing reasons, I think Condition 1 and Instruction 2 were insufficient to override the plain provision of the commercial bill of lading.

Moreover, only two months before the shipment in the case at bar the Comptroller General made a ruling regarding a shipment by the United States to the Philippines which apparently arrived shortly before the Japanese took [fol. 70] possession, where the government and commercial bills of lading were identical with those we have under consideration. The Secretary of the Navy had asked for instructions from the Comptroller General as to whether he should pay the freight where the vessel had reached the Philippines, but there was no proof that the cargo had been received by the consignee or that the latter had receipted for it upon the bill of lading. The instructions of the Comptroller to the Secretary were as follows:

“ * * * you are advised that this office will not be required to object to the payment, otherwise proper of carriers' bills for transportation charges on shipments to the Philippine Islands or Guam in instances where the original bill of lading or other form of receipt showing delivery to the consignee cannot be obtained, if a satisfactory showing be made of facts or circumstances reasonably establishing the carriers' inability, by reason of war, to effect delivery and obtain a receipt from the consignee, where the claim in each instance is supported by a memorandum copy or shipping order copy of the bill of lading showing the material shipped and corresponding in pertinent detail with the memorandum copy duly signed by the carrier's agent and retained administratively as contemplated

in the instructions on the reverse of the original bill of lading. * * * [21 Comp. Gen. 909, 913.]

Even though we do not regard the above ruling as controlling our interpretation of the bill of lading in the present case, it at least shows that the meaning of the government bill of lading was sufficiently doubtful to lead the Comptroller to treat the provisions of Condition 1 and Instruction [fol. 71] 2 as subject to exceptions and defenses where delivery could not be completed owing to war conditions.

For the above reasons, I think the decision of the court below was right and should be affirmed.

[fol. 72] IN UNITED STATES COURT OF APPEALS, SECOND
CIRCUIT

Present: Hon. Learned Hand, Chief Judge; Hon. Augustus N. Hand, Hon. Jerome N. Frank, Circuit Judges.

ALCOA STEAMSHIP CO., INC., Plaintiff-Appellee,

v.

UNITED STATES, Defendant-Appellant

JUDGMENT—Filed June 29, 1949

Appeal from the District Court of the United States for the
Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed; petition dismissed in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) Alexander M. Bell, Clerk.

[fol. 73] [File endorsement omitted.]

[fol. 74] IN UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

[Title omitted]

PETITION FOR REHEARING

This is a petition by the plaintiff-appellee for rehearing under Rule XXVIII of the Rules of the United States Court of Appeals for the Second Circuit.

Notwithstanding the high esteem in which counsel for the appellee holds the honored judge who wrote the prevailing opinion he believes the errors contained in that opinion require and justify this application. Jove sometimes nods. The Olympians are not always right.

First

In the present case the Government Bill of Lading provides:

"Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier."

There is no doubt in this case under carrier's bill of lading recovery would have been permitted to the carrier.

As the dissenting opinion accurately states: The provision for the payment of freight whether or not the vessel [fol. 75] was lost "now general in commercial bills of lading must govern 'unless otherwise specifically provided or otherwise stated' in the government bill of lading. In other words, the company bill of lading should prevail unless clauses in the bill of lading prepared by the government and therefore to be construed against it in resolving any ambiguities, 'specifically' have provided otherwise." (Emphasis supplied.)

When it requires from two to three pages of reasoning, much of it by assumption or by inference, to establish that it is "otherwise specifically provided," it would hardly seem that one should say it has been provided "specifically". When by the Government bill it was desired to avoid a short statute of limitations contained in the carrier's bill

it "specifically" said so! (Condition 7 of Government Bill, Exhibit 9). When by the Government bill it was desired to avoid prepayment of freight permitted under the carrier's bill, it "specifically" said so! (Condition 1 of Government Bill, Exhibit 9).

Specifically means with exactness and precision. (Webster.)

The prevailing opinion has demonstrated beyond a peradventure that "*specifically*" is nonexistent on the issue presented on this appeal.

Second

The prevailing opinion is in error in its application of the thought that, "We do not think that the administrative rulings should have any substantial weight in our decision."

Perhaps there may be in some cases justification for this highly generalized conclusion. However in the instant case there is none.

The Government Bill of Lading is the product of and approved by the Comptroller General August 24th, 1928. [fol. 76] (See Exhibit 9, p. 23a Exhibit Volume.) If a Government official is not to be an interpreter of an instrument which he prepares and drafts for public use, then the attempt of courts to look for Congressional intent in a law which has been passed, to see what Congress in Committee or in Session has said, is all off the beam. No judge or court has yet so held. Until there is authority along that line what the Comptroller General says about the instrument which he prepares becomes of substantial weight. What he says it means is presumptively what it was intended to mean. *And officially the Comptroller General has sustained the appellee's interpretation.*

Third

The prevailing opinion sustains itself in part by using the support of proof which is not in the record.

The Attorney General's Office improperly incorporated in its brief and argument a part of a letter which formed no part of the record of the trial (p. 21 of appellant's brief). That letter has nevertheless, no doubt unwittingly, been used to reach and fortify the conclusion in the prevailing opinion. This is not a case of judicial notice. The incorpo-

ration of that letter violates the most elementary rule of procedure and practice.

Fourth

The reasoning of the prevailing opinion revolves around the statement that it is the "well-settled law that freight is never earned until the cargo is delivered." But as the dissenting opinion decisively points out:

"I cannot see that the general maritime rule that freight is not earned until cargo is delivered has anything to do with such a situation as we have here. That rule does not apply to cases where there is an agreement to the contrary."

[fol. 77] We know that for more than 30 years (1918) this last has been the accepted law. So that in 1928 when the Comptroller General formulated the Government Bill of Lading Form, and for ten years before, the principle which is reiterated by the prevailing opinion had had no application in the usual and customary commercial bill of lading. It follows that such statements as "it was not unnatural for the United States, if its own insurer, to wish to have the privilege which the law gives to shippers in general" are deceptive. Such a conclusion overlooks the well settled commercial practice that freight is earned on shipment and the effect of the second of the "Conditions" in the Government bill making it "subject to the same rules and conditions as govern commercial shipments." Shippers in general had no privileges except those in the customary and usual bill of lading.

The Court suggests that such customary shifting of the risk may have come about "because of the carrier's superior bargaining position". It is urged that no basis has been shown for such a suggestion; even if this were the correct explanation of the origin of the practice, it would be wholly irrelevant. The important fact is that there *was* such a well established practice which was incorporated into the terms of the carrier's bill of lading and that the charges and risks of the carrier and shippers had been adjusted on the basis of the existence of that practice at the time the shipment of the appellant was made.

The prevailing opinion suggests that there is "no reason why the United States . . . should wish to defer the payment of a claim which it must inevitably pay at some

time." An excellent reason is quite apparent to those familiar with the cumbersome routine and delays inherent in the Government's disbursing system. If the shipment or delivery of the Government's cargo were to be delayed pending the preparation and presentation by the carrier [fol. 78] and the auditing and payment of the Government vouchers necessary to obtain payment of advance or collect freight, it is clear that the prompt despatch of the Government's shipments would be seriously jeopardized. To avoid such delays, the consequences of which might be especially grave in time of war, the Government bill of lading quite properly stipulates that the carrier shall not demand payment of its charges either in advance or at destination.

Fifth

We feel that in view of the fact that the prevailing opinion has struck into fields which were neither briefed nor argued by the appellant, the appellee should be given an opportunity to be heard. We believe that there are answers to the argument of the prevailing opinion and that a hearing should be given to present them.

Sixth

Judge Jerome Frank in his work, "Law and the Modern Mind", which has been widely acclaimed, says:

"The judge at his best, is an arbitrator, a 'sound man' who strives to do justice to the parties by exercising a wise discretion with reference to the peculiar circumstances of the case. He does not merely 'find' or invent some generalized rule which he 'applies' to the facts presented to him. He does 'equity' in the sense in which Aristotle—when thinking most clearly—described it. . . . the arbitral function is the central fact in the administration of justice."

We feel that this court in this cause should be judges at their best and do equ. v. There is no just reason why government should hold any preferred position among shippers.

[fol. 79] The prevailing opinion assumes that any particular shipper, including the United States, may, by special agreement with the carrier, avail itself of some sort of

"privilege" given by the admiralty law to require the carrier to transport the cargo on the old basis that freight is not earned and payable unless the goods are delivered by the carrier at destination.

Such an assumption has no foundation when the carrier's charges and established terms of carriage contemplate that the risk of loss of freight shall be upon the cargo owners. The assumption fails to take into account the provisions of Sections 16 and 17 of the Shipping Act, 1916 (46 U. S. C. Secs. 815, 816), which, among other things, make it unlawful for any common carrier by water to make or give any undue or unreasonable preference or advantage to any person in any respect whatever or to allow any person to obtain transportation at less than the regular rates or charges then established and enforced on the line of such carrier and which also forbid carriers to demand, charge or collect charges which are unjustly discriminatory between shippers.

It is therefore clear that where the carrier's terms of shipment and charges are based on freight being earned upon shipment and, therefore, at shipper's risk, it would be unlawful for the carrier to discriminate in favor of any particular shipper by assuming the freight risk, at least without making a reasonable extra charge. Furthermore, such terms would have to be made available to all shippers desiring to take advantage of them.

The statute makes no exception exempting the Government from the duties which it imposes on carriers and shippers alike. Nor does the statute permit the carrier to discriminate in favor of the Government.

[fol. 80]

Seventh

The present judicial score in this case is two-two. As to opinions the score is one for the appellant and two for the appellee. All of which seems to indicate that the cause is a close one. If that be so then the errors which have been pointed out have tipped the balance against the appellee and the cause should be reviewed.

Respectfully, Wood, Molloy, France & Tully, Attorneys for Plaintiff-Appellee.

[fol. 81]

Certificate of Counsel

I hereby certify that I have examined the foregoing petition for a rehearing, and in my opinion such petition is well founded and should be granted by this Honorable Court and said petition is not presented for purposes of delay.

Dated: July 11, 1949.

Melville J. France.

[fol. 82] IN UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

[Title omitted]

Before L. Hand, Augustus N. Hand and Frank, Circuit
Judges

DENIAL OF PETITION FOR REHEARING

Wood, Molloy, France & Tully for the Petitioner.

PER CURIAM:

Petition for Rehearing Denied.

C. J.J.

Filed: July 18, 1949.

[fol. 83] IN UNITED STATES COURT OF APPEALS, SECOND
CIRCUIT

Present: Hon. Learned Hand, Chief Judge; Hon. Augustus N. Hand, Hon. Jerome N. Frank, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed July 18,
1949

A petition for a rehearing having been filed herein by counsel for the appellee.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

(S.) Alexander M. Bell, Clerk.

[fol. 84] [File endorsement omitted.]

[fol. 85] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 86] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 1] PLAINTIFF'S EXHIBIT. 1

Return of Comptroller General

Pursuant to stipulation, the first page, one entry on page 5, one entry on page 6, and a part of an entry on page 7 only are printed.

Form 40 A

Advice of Payment of Settlement to Accompany Check
General Accounting Office

Claim No. 744034 Washington, January 11, 1945.
(Date)

In correspondence please refer to above claim No.

Certificate No. T-230977

Alcoa Steamship Company, Inc.,
17 Battery Place,
New York 4,
New York.

(Checks to be drawn as below)

I have certified that there is due you from the United States, payable from the appropriation(s) indicated, the sum of—

Seventy-six and 39/100 Dollars (\$76.39)

on account of Freight Bill NY-3578. (War Department)
212/50905 Engineer Service, Army, 1942-1945

(8-32267 P 430-03 A 0905-24)

[Rubber Stamp] 501-970 P 970-13 S 99-999

[fol. 2a] Checks to issue:

Claimant as above, \$ 8.62 *ch*
 Treasurer of the United States, \$67.77

ch, handwritten in red *Italic* figures circled in red.

For credit to:

"21-110/20002 Emergency Fund for the President,
 War (Allotment to War Department), 1940-1942"
 Limitation 21-110/20002.007.

Amount Claimed \$23,137.79

Amount Allowed 8.62

Difference \$23,129.17

(See attached sheets)

The enclosed Treasury check is in settlement of said claim(s).

Lindsay C. Warren, Comptroller General of the
 United States, By A. J. Stout.

CLAIMANT'S NOTICE

(Page 5) Bill G-639, Voucher 357409, 3/42 Dixon
 B/L WE-298987, 1/1/42, Pt. of St. Joe, Fla. to Pt. of
 Spain, Trinidad, B.W.I.

Paid \$24453.83. Should be \$19563.06. Difference \$4890.77.

[fol. 3a] (Page 6) Bill G-534, Voucher 329413, 3/42 Dixon.
 B/L WE-231286, 11/17/41, Tampa, Fla. to Pt. of Spain,
 Trinidad, B.W.I.

Paid \$17788.65. Should be \$14230.92. Difference \$3557.73.

(Page 7 Basis: No authority for 25% increase in rates on
 lumber in Exceptions #49 to Windward & Leeward
 Islands Conf. Tariff 1W1.

[fol. 4a]

PLAINTIFF'S EXHIBIT 2

(Letter of General Accounting Office)

GENERAL ACCOUNTING OFFICE, WASHINGTON

Claims Division

In Reply Please Quote

OCD-WJV

Dec. 18, 1944.

Alcoa Steamship Company, Inc.,
17 Battery Place,
New York, New York.

DEAR MR. COLE:

Reference is made to your letter of December 5, 1944, relative to the application of the 25% increase in freight rate applicable on lumber moving from Gulf ports of the United States to the West Indies ports served by your company, in which you suggest that this office contact Mr. L. Tibbott, Chief, Agreement Section, Division of Regulations, United States Maritime Commission, for an explanation as to the application of the 25% "surcharge".

Under the provisions of section 305 of the Budget and Accounting Act, this office is vested with the authority to settle and adjust all claims and demands by the Government of the United States, or against it, for the transportation of Government property.

Since the rates and agreements involved have been reduced to writing and are contained in published tariffs [fol. 5a] publicly filed with the United States Maritime Commission, of which this office has been furnished with a complete copy, it appears no useful purpose would be served by such discussion. However, this office will give consideration to any material evidence which you may desire to furnish regarding this matter.

Respectfully, A. H. Epperson, Assistant Chief,
Claims Division.

[fol. 6a]

PLAINTIFF'S EXHIBIT 3

(Letter of Alcoa Steamship Company, Inc.)

ALCOA STEAMSHIP CO., INC., NEW YORK

February 16, 1945.

General Accounting Office
3800 Newark Avenue, N. W.
Washington, D.C.

Attention: Mr. A. H. Epperson, Assistant Chief, Claims
Division.

DEAR MR. EPPERSON:

We refer to your letter of December 18th (O C D-W J V) concerning your questioning of the application of a twenty-five (25) per cent increase on basic freight rates effective September 18, 1939, on lumber moving from Gulf Ports, United States of America, to the West Indies.

We of course understand that your office is vested with the authority to settle and adjust all claims and demands against the United States for transportation of government property and our suggestion of reference to the Division of Regulations, United States Maritime Commission was occasioned by the thought that the Division might supply facts which would help you to reach a conclusion. Your letter suggests that we submit any material evidence we may desire to furnish regarding this matter and we are glad to avail ourselves of this suggestion. We feel that a clear presentation of the facts leads to a different conclusion from that which you presently entertain. This statement of fact is somewhat lengthy, but it is impossible to shorten it and still give you the complete picture.

{fol. 7a} Alcoa Steamship Company, Inc. was formerly named Ocean Dominion Steamship Corporation and the Corporation frequently used the tradename "Aluminum Line" in the operation of its services from the Gulf and South Atlantic ports.

For the purpose of easy reference we set forth the material part of an order of the Secretary of Commerce. On July 12, 1935, Daniel C. Roper, as Secretary of Commerce, duly issued an order known as Docket No. 128, effective on and after September 1, 1935, pursuant to Sec-

tion 19 of the Merchant Marine Act, 1920, which provided in part as follows:

“(1) Every common carrier by water in foreign commerce shall file with the United States Shipping Board Bureau of this department schedules showing all the rates and charges for or in connection with the transportation of property, except cargo loaded and carried in bulk without mark or count, from points in continental United States, not including Alaska or the Canal Zone, to foreign points on its own route; and, if a through route has been established with another carrier by water, all the rates and charges for or in connection with the transportation of property except cargo loaded and carried in bulk without mark or count, from points in continental United States, not including Alaska or the Canal Zone, on its own route to foreign points on the route of such other carrier by water. The schedules filed as aforesaid by any such common carrier by water in foreign commerce shall show the point from and to which each such rate or charge applies; and shall contain all the rules and regulations which in anywise change, affect or deter- [fol. 8a] mine any part or the aggregate of such aforesaid rates or charges.

“(2) Schedules containing the rates, charges, rules and regulations in effect on the effective date of this order shall be filed as aforesaid on or before October 1, 1935, and thereafter any schedule required to be filed as aforesaid, and any change, modification or cancellation of any rate, charge, rule or regulation contained in any such schedule shall be filed as aforesaid within thirty (30) days from the date such schedule, change, modification or cancellation becomes effective.

“(3) Any schedule, rate, charge, rule or regulation, or any change, modification or cancellation thereof, as aforesaid, when filed shall be accompanied by a sworn statement by a duly authorized person that such schedule, rate, charge, rule or regulation, change, modification or cancellation is the schedule, rate, charge, rule or regulation, change, modification or cancellation in effect on the date indicated via the line of the carrier, or in conjunction therewith.”

In the month of June, 1937, the Windward and Leeward Islands Conference, composed of the American Caribbean Line, Inc., Bermuda and West Indies Steamship Company, Ltd. and Ocean Dominion Steamship Corporation, of which Conference William H. Griffin was Secretary, filed with the United States Maritime Commission in conformity with Docket No. 128, its Freight Tariff LW-1, constituting its Commodity Rates applying from New York (and United States North Atlantic Ports) to Windward and Leeward Island, etc.

[fol. 9a] At that time Ocean Dominion Steamship Corporation (subsequently changed to Alcoa Steamship Company, Inc.), operating as a common carrier by water, also operated a service from United States of America, South Atlantic and Gulf Ports to Windward and Leeward Islands, etc.

Practically simultaneously with the filing by the Windward and Leeward Islands Conference of its said Freight Tariff LW-1 by its secretary, William H. Griffin, the same William H. Griffin, who was also the General Traffic Manager of Ocean Dominion Steamship Corporation, filed on behalf of the last named steamship company with the United States Maritime Commission its concurrence in the rates of Freight Tariff LW-1, and adopted as its own the rates and charges for commodities as set forth in said tariff. That document reads in part as follows:

"That I have been duly authorized to file on behalf of Ocean Dominion Steamship Corporation (Aluminum Line) the rates and charges charged by them for or in connection with the transportation of property from U. S. A. (South) Atlantic and Gulf Ports to Windward and Leeward Islands, Trinidad, British Guiana and Ciudad Bolivar, Venezuela, and that the rates, charges rules or regulations or changes, modifications, or cancellations thereof as shown in Windward and Leeward Islands Conference Freight Tariff LW-1, supplements thereto and reissues thereof, filed with the Division of Regulations by W. H. Griffin, Secretary of the Windward and Leeward Islands Conference, are the rates, charges, rules or regulations or changes, modifications or cancellations thereof actually observed by the Ocean Dominion Steamship Corporation (Aluminum [fol. 10a] Line) effective June 5, 1937, with the excep-

tion of items listed on attached sheet entitled 'Exception No. 1 to Freight Tariff LW-1'."

Said Freight Tariff LW-1, in its "Item #26" listed commodities and their rates. Under the said heading "Item #26" it set forth "Lumber, Yellow Pine—Special arrangement" and provided no rate for yellow pine lumber, because it was not a commodity in usual shipment by the members of the Windward and Leeward Islands Conference. However, yellow pine lumber was a customary commodity carried by the Ocean Dominion Steamship Corporation from United States Gulf Ports to the Windward and Leeward Island, etc. Accordingly Ocean Dominion Steamship Corporation filed with its "concurrence", adopted and filed as above stated, what it termed an "Exception", entitled "Exception No. 1 to Freight Tariff LW-1". That "Exception" set forth rates for yellow pine lumber, which had been omitted from Freight Tariff LW-1, providing in the commodity list such specified rates in place of "Special arrangement", and the said "exception" further provided as to commodities "where no rate is given, Freight Tariff LW-1 rate applies." The use of the term "exception" is perhaps misleading; what it did do was to supply a deficiency which was lacking in the commodity rates, which were listed in "Item #26".

Thereafter Ocean Dominion Steamship Corporation continued to make the charges and rates set forth in the commodity list, "Item #26", of Freight Tariff LW-1, as supplemented by its so-called "Exception No. 1". It was both the purpose and we believe the effect of said "exception" to provide in the commodity list a rate for yellow pine [fol. 11a] lumber for which no rate had been adopted by conference; in place and stead of "special arrangement" in the commodity list there was substituted actual specific rates for yellow pine lumber.

On or about October 17, 1939, the Windward and Leeward Islands Conference of which Ocean Dominion Steamship Corporation was a member and the secretary of which was also general traffic manager of Ocean Dominion Steamship Corporation, filed with the United States Maritime

Commission its "Rate Advice No. 12 to Freight Tariff LW-1", which provided in part:

"Item No. 26 'Before Commodity Rates'—Add: All rates named under Item No. 26 are subject to an increase of 25%. Effective September 18, 1939."

It was the belief of the general traffic manager of Ocean Dominion Steamship Corporation, who was also the secretary of the Windward and Leeward Islands Conference, and also the belief of Ocean Dominion Steamship Corporation that its concurrence in the commodity rates of Freight Tariff LW-1, "Item #26", and "Supplements" thereto carried with it both the benefits and obligations thereof and that no additional filing by it was necessary or required. Under that belief Ocean Dominion Steamship Corporation immediately advised shippers over its services from the Gulf of the 25% increase of basic rates.

The Leeward and Windward Islands Conference notice to shippers on September 16, 1939, was in the following language:

[fol. 12a]

"September 16, 1939.

IMPORTANT NOTICE

"The European war has resulted in the immediate increase in operating costs of the lines members of this Conference which makes it necessary to increase freight rates effective September 18 on cargo destined Trinidad, Barbados, Demerara, St. Martin, St. Bartholomew, St. Kitts, Antigua, Montserrat, Dominica, St. Lucia, St. Vincent, Grenada, Guadeloupe, Martinique and Ciudad Bolivar, with transshipment at Port of Spain.

"The increase will be 25% and will be figured on the base rates. The landing or surcharge of 5% will continue in force and will be assessed on the full freight including the 25% increase.

W. H. Griffin, Secretary.

For and on behalf of the following carriers: American Carribbean Line, Bermuda & West Indies Steam-

ship Co., Ltd. (Furness Withy & Co., Ltd. as agents),
Ocean Dominion Steamship Corporation."

The notice of Ocean Dominion Steamship Corporation to its shippers on the same date was as follows:

[fol. 13a]

"September 16th, 1939.

Important Notice to Shippers

"Due to increased operating costs as a result of the European war, effective September 18th, 1939, there will be a 25% increase in our base freight rates on cargo destined Trinidad, Dominica, Barbados, Demerara, St. Martin, St. Kitts, St. Vincent, Grenada, Guadeloupe, Martinique and Ciudad Bolivar with transshipment at Port of Spain, Trinidad.

"The surcharge of 5% will continue in force on all cargo, except lumber, and will be assessed on the full freight including the 25% increase.

Aluminum Line"

The increase of 25% upon base rates was fair and just. It was charged both by Conference members and by Ocean Dominion Steamship Corporation on its Gulf shipments. We do not know of any one either private shipper or government official, bureau or department that has questioned the justness and fairness of this increase. The United States Maritime Commission Regulation Division, has stated that it has "seen no evidence which would indicate that the rates which you assessed were prejudicial, preferential or otherwise unlawful."

The United States Maritime Commission, however, expressed the opinion that there had been a technical non-compliance with Docket No. 128 in that "Aluminum Line" had not filed its "Important Notice to Shippers" dated September 16, 1939, but raised no question but that the rates in it had been regularly established and enforced.

[fol. 14a] In any event such non-compliance with Docket No. 128, if such there was, did not affect the validity of the 25% increase in base rate; at most it might subject "Aluminum Line" to a penalty for not filing.

However, this technical non-compliance has been cured and the Maritime Commission has accepted as of September 18, 1939, Alcoa Steamship Company's rate advice to

shippers, containing the "25% increase in our base freight rates". A copy of that filing is attached to this letter and marked "Exhibit 1".

We request that you review the question of our lumber rates in the light of the facts herein set forth and we trust that you will find it possible to withdraw your objection to these rates.

Yours very truly, Alcoa Steamship Company, Inc.,
 _____, Auditor.

WTC:AWL

[fol. 15a]

PLAINTIFF'S EXHIBIT 4

(Letter of Alcoa Steamship Company, Inc.)

ALCOA STEAMSHIP COMPANY, INC.
 Seventeen Battery Place, New York 4, N. Y.
 Cables: Alcoa-ship, Tel.: Whitehall 4-1500.

January 9, 1946.

General Accounting Office,
 3800 Newark Street, N. W.,
 Washington, D. C.

GENTLEMEN: *Att: Chief of Claims Transportation*

An amount of \$3,557.73 on bill No. G-534 paid by voucher No. 329413 in March, 1942, W. M. Dixon, has been deducted from bill No. N. Y.-3578 by settlement No. T-230977.

Refund in the amount of \$3,557.73 is requested as the deduction of the sum involved was based on the contention that a 25% surcharge was not applicable on rates as published in Exception 49 of Windward and Leeward Islands Conference Tariff No. L-W 1. On February 16, 1945, the Company filed with your office a complete explanation and justification of the application of the said 25% increase. The subject was taken under review by your office and on August 29, 1945 the Company was advised that your office had recognized the merits of the Company's position and that orders had been given to allow the said 25% increase on lumber rates from Gulf Ports.

Very truly yours, Alcoa Steamship Company, Inc.,
 W. T. Cole, Auditor.

WTC:L

[fol. 16a].

PLAINTIFF'S EXHIBIT 5

(Letter of Alcoa Steamship Company, Inc.)

ALCOA STEAMSHIP COMPANY, INC.

Seventeen Battery Place, New York 4, N. Y.

Cables: Alcoa-ship, Tel.: Whitehall 4-1500.

January 9, 1946.

General Accounting Office,
3800 Newark Street, N. W.,
Washington, D. C.

GENTLEMEN: *Att: Chief of Claims Transportation*

An amount of \$4,890.77 on bill No. G-639 paid by voucher No. 357409 in March, 1942, W. M. Dixon, has been deducted from bill No. N. Y. 3578 by settlement No. T-230977.

Refund in the amount of \$4,890.77 is requested as the deduction of the sum involved was based on the contention that a 25% surcharge was not applicable on rates as published in Exception 49 of Windward and Leeward Islands Conference Tariff No. L-W 1. On February 16, 1945, the Company filed with your office a complete explanation and justification of the application of the said 25% increase. The subject was taken under review by your office and on August 29, 1945 the Company was advised that your office had recognized the merits of the Company's position and that orders had been given to allow the said 25% increase in lumber rates from Gulf Ports.

Very truly yours, Alcoa Steamship Company, Inc.,
W. T. Cole, Auditor.

WTC:L

[fol. 17a]

PLAINTIFF'S EXHIBIT 6

(Advice of Payment of Settlement)

Form 40A

Advice of Payment of Settlement To Accompany Check

General Accounting Office

Claim No. 744034

Washington, February 2, 1946.

(Date)

Certificate No. T-283800

In correspondence please refer to above claim No.

Alcoa Steamship Company, Inc.,
17 Battery Place,
New York 4,
New York.

I have certified that there is due you from the United States, payable from the appropriation(s) indicated, the sum of—

Four Thousand Nine Hundred Twenty-Seven and 98/100
Dollars (\$4,927.98)
on account of

Carrier's letters dated January 9, 1946, supplemental to Freight Bills G-534 and G-639, D. O. Vouchers 329413 and 357409, March 1942 accounts of W. M. Dixon. (War Department)

212/60905 Engineer Service, Army, 1942-1946

(8-32795 P430-03 \$1,370.25)

(8-32795 P210-03 \$3,557.73)

(See attached sheet)

[fol. 18a] The enclosed Treasury check is in settlement of said claim(s).

Lindsay C. Warren, Comptroller General of the
United States, By B. Y. Williams.

CLAIMANT'S NOTICE :

(Attached Sheet)

Claim No. 744034

Certificate No. T-283800

Amount Claimed \$8,448.50

Amount Allowed \$4,927.98

Difference \$3,520.52

Bill G-534, Voucher 329413, 3/42, W. M. Dixon, B/L WE-231286, 11/17/41.

Tampa, Fla. to Port of Spain, Trinidad, B. W. I.

Alcoa Steamship Co., Inc., New York office.

Paid \$14,230.92 Should be \$17,788.65 Due carrier
\$3,557.73

Bill G-639, Voucher 357409, 3/42, W. M. Dixon, B/L WE-298987 1/1/42

Port St. Joe, Fla., to Port of Spain, Trinidad, B. W. I.

Alcoa Steamship Co., Inc., New York office.

Paid \$9,563.06 Should be \$24,453.83 Due carrier \$4,890.77

[fol. 19a] *Deduction*

Bill G-1247, Voucher 295647, 9/42, J. P. Tillman, B/L WE-310320 6/13/42

Mobile, Alabama to Port of Spain, Trinidad, B. W. I.

Paid \$3,520.52 Should be Nil Overpaid \$3,520.52.

The government bill of lading on which the property was shipped contemplated payment upon presentation of said bill of lading showing delivery at destination. The bill of lading does not show delivery as contemplated and the record does not establish any requirement for payment otherwise. Consignee's Certificate of Delivery states "S.S. Gunvor has been lost due to enemy action".

[fol. 20a]

PLAINTIFF'S EXHIBIT 7

Memorandum Accompanying Check

Sep. 15, 1942.

The enclosed check, No. _____, settles voucher submitted for payment of the account described in the memorandum hereon.

(No acknowledgment of receipt of check is necessary)

Name: Alcoa Steamship Company, Inc.
Address: 17 Battery Place,
New York, New York

MEMORANDUM

NOTE.—If the payee named in the attached voucher will supply below such data as will identify the check drawn in payment thereof with the account in his office, this slip will be mailed with the check.

U. S. Army, Finance Officer,
War Department, Washington, D. C.
(Department, Bureau, or Establishment)

Bill No. G-1247
Amount, \$3520.52
S/S Gunvor #37
WE 310320
Bill No. M-2209
B/L No. M-109

[fol. 21a]

PLAINTIFF'S EXHIBIT 8

Notice from General Accounting Office

Form 1003

General Accounting Office
Claims Division, Washington

Chief Billing Clerk

Alcoa Steamship Co., Inc.
17 Battery Place, New York City, N. Y.

Jul 24 1944.

Your Bill No. G 1247
Frt

Kind of service rendered

War

(Department or Agency)
(Bureau or Office)

Amount Paid—\$3520.52

By J. P. Tillman

Vou. No. 295647—9/42

Overpayment—\$3520.52

Appn. Symbol(s): 211/20907

Refer to File No. T-6AO—295647—9/42 J P T

SIRS:

In the audit of your bill described above, an overpayment has been noted as explained below.

Pursuant to Sec. 322 of the Transportation Act, 1940, 54 Stat. 955, a deduction will be made from an amount otherwise due your company unless the amount thus overpaid is refunded within sixty (60) days,—check to be made payable to "The United States" and mailed direct to this office.) [Matter in parentheses stricken through.]

Return one copy of this form with your remittance.

Respectfully, D. Neumann, Chief, Claims Division.
By L. E. Noe, Chief of Section.

Exception(s):

Reference is made to reply to exception dated May 8, 1944 and contents thereof have been noted.

Comptroller General's Decision B 24613 has no bearing on subject case, however Comptroller General's Decision B-30846, Dec. 15, 1942 addressed to Bull Insular Line, Inc., Pier 45, Pratt Street, Baltimore, Maryland covers shipments lost thru enemy action.

Suspension is therefore continued without modification.

J. S. T.

AHE

(Here follow 2 photolithographs, side folios 23, 23a)

ADMINISTRATIVE DIRECTIONS

1. Government property will be transported on the prescribed form of Government bill of lading (original, memorandum, and shipping order), which will be identified by serial numbers.

2. Through bills of lading will be issued in all instances between initial and ultimate points, except when rates more advantageous to the Government may be otherwise secured.

3. When shipments are made under contract or special rates, notation of such fact should appear on the face of bills of lading.

4. Officers charged with the duty of providing or securing Government transportation should familiarize themselves with land-grant railroads in order that shipments may be made at the lowest rates available to the Government by the use of such lines, or lines equalizing rates therewith.

5. Public property may be delivered by any Government officer or agent to the Quartermaster Corps, U. S. Army, which will ship the same under its regulations. (28 Stat. 111.)

6. Bills of lading must describe shipments of articles by their commercial names, giving separately such weights, dimensions, and manner of packing as may be necessary to ascertain classifications and rates and to enable recovery in case of loss or damage.

7. If the number of articles to be shipped be too great for the blank form (original, memorandum, and shipping order), extra sheets of the prescribed form should be used, and so attached and designated as to form but one bill of lading, under one number.

8. A voucher when submitted for settlement shall cover charges to one office or service only. The name of the office is inserted at the top of the bill of lading. Correspondence regarding transportation accounts shall be addressed to the particular office or service and references made to the serial numbers of the Government bills of lading included in the company's bill.

(23a)
(68B)

GENERAL CONDITIONS AND INSTRUCTIONS

CONDITIONS

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

3. Shipment made upon this bill of lading shall take no higher rate than would be charged had the shipment been made upon the uniform straight bill of lading or uniform express receipt.

4. No charge shall be made by any carrier for the execution and presentation of bills of lading in manner and form as provided by the instructions hereon.

5. This shipment is made at the restricted or limited valuation specified in the tariff or classification at or under which the lowest rate is available, unless otherwise indicated on the face hereof.

6. Receipt of the shipment is made subject to the "Report of Loss, Damage, or Shrinkage" noted hereon.

7. In case of loss, damage, or shrinkage in transit, the rules and conditions governing commercial shipments shall not apply as to period within which notice thereof shall be given the carriers or to period within which claim therefor shall be made or suit instituted.

INSTRUCTIONS

1. Erasures, interlineations, or alterations in bills of lading must be authenticated and explained by the person making them.

2. Shipping order, original bill of lading, and memorandum bill of lading should be used in making a shipment. Only one original bill of lading will be issued for a single shipment. The shipping order should be furnished the initial carrier. The original bill of lading and memorandum copies should be signed by the agent of the receiving carrier, returned to the consignor, and the original promptly mailed to the consignee. The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. Memorandum copies of bills of lading may be used as administrative officers direct.

3. In the absence of the consignee, or on his failure to receipt, the person receipting will certify that he is duly authorized to do so, reciting such authority.

4. In no case will a second bill of lading be issued for a shipment, nor will a bill of lading be issued after the transportation has been performed. In case the bill of lading has been lost or destroyed, the carrier shall be furnished by the consignee with a "Certificate in Lieu of Lost Bill of Lading," on the standard form prescribed therefor which, when finally consummated by acknowledgment of the "Certificate and Waiver by Transportation Company," shall accompany the bill for services submitted by the carrier to the officer charged with the settlement of the account. Should the original bill of lading be located after settlement has been made on the certificate, it will be forwarded to the administrative office of the department concerned for transmittal to the General Accounting Office.

5. To insure prompt delivery of property, in the absence of the bill of lading, the consignee should give to the carrier a "Temporary Receipt," executed on the prescribed form, for the property actually delivered. On the recovery of the bill of lading, or when the certificate provided for above shall have been given, a statement will be indorsed on said bill of lading or certificate of the fact of the delivery as per said temporary receipt, and the said temporary receipt will be indorsed with reference to the bill of lading or certificate sufficient to identify the same, and both papers attached and forwarded with the claim for payment thereon.

6. In case of loss or damage to property while in the possession of the carrier, such loss or damage shall, when practicable, be noted on the bill of lading or certificate in lieu thereof, as the case may be, before its accomplishment. All practicable steps shall be taken at that time to determine the loss or damage and the liability therefor, and to collect and transmit to the proper officer, without delay, all evidence as to the same. Should the loss or damage not be discovered until after the bill of lading or certificate has been accomplished, the proper officer shall be notified as soon as the loss or damage is discovered, and the agent of the carrier advised immediately of such loss or damage, extending privilege of examination of shipment.

7. Bills must be submitted by the general officers of carriers, and on forms furnished by the Government, to be obtained from the Public Printer, Washington, D. C.

[fol.24a]

PLAINTIFF'S EXHIBIT 10

Alcoa Steamship Company's Regular Form Bill of Lading

Pursuant to stipulation clauses 3, 6 and 30 only are printed.

"3. The Goods, whether perishable or not, are accepted by the Carrier subject to delays or default in shipment, transportation, delivery or otherwise, occasioned by war, rebellion, riots, strikes, stoppage of labor, lockouts or labor troubles of Carrier's employees or others; shortage of labor, fuel, conveyances or room; lack of facilities of any sort; accumulation of cargo; weather, ice; or any conditions, whether or not of a like kind to those herein stated, not shown due to Carrier's fault; and notice to shipper or others of any danger of such delay or default is hereby waived; and the Carrier shall not be responsible for any such delay or default; and if loading of the Goods in the customary manner is delayed, or the Vessel is likely to be detained she may proceed without loading or completing the loading of the Goods."

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"6. Full freight to destination, whether intended to be prepaid or collected at destination, and all advance charges against the Goods are due and payable to Alcoa Steamship Company, Inc. as soon as the Goods are received for purposes of transportation; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully [fol. 25a] earned and due and payable to the Carrier at any stage, before or after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid), Goods or Vessel lost or not lost, or if the voyage be broken up; and the same shall be payable in lawful money of the United States; and the Carrier shall have a lien on the Goods therefor (whether payable in advance or not and though noted hereon as prepaid); and said lien shall not be waived even though the goods are delivered to carrier, or landed on the pier, or placed in storage; and

in case of loss of any part of the Goods, the Carrier shall have a lien on the Goods or any part or proceeds for the whole thereof; and the shipper, consignee and/or assigns shall be jointly and severally liable therefor, and notwithstanding any lien therefor has been surrendered. Full freight shall be payable on damaged and unsound goods. The Carrier may collect freight on bill of lading weight, measurement or quantity, and, if gross weight, measurement or quantity delivered exceeds weight, measure or quantity on which freight may be computed, the Carrier may collect freight on such excess, unless shown to have been caused by absorption of water during the voyage. Any error in freight or other charges or in the classification herein of the Goods is subject to correction, and if on correction the freight or charges are higher, the Carrier may collect the additional amount. Should a package consist of several parcels for more than one person, full freight shall be paid on the parcels for each person as if shipped and consigned as a separate package. If there be an enforced interruption or abandonment of the voyage at a port of distress or elsewhere and the Goods or any part be forwarded, the cost thereof, including extra compensation [fol. 26a] if performed by vessels in the service of the Carrier, shall be paid by shipper, consignee and/or assigns."

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"30. It is mutually agreed, that in addition to the other terms and conditions of the bill of lading which shall be deemed affected only so far as inconsistent herewith, this shipment is at the sole risk of the owners thereof, of all risks of war, preparation for war, arrest, restraint, capture, seizure, destruction, detention, sinking by explosive mines, torpedoes, or otherwise, interference or hostilities on the part of any Power and of all consequence thereof and the vessel shall have liberty in the discretion of the master, owner or any agent or charterer thereof to proceed notwithstanding any such risks; also, if deemed advisable in the judgment of such master, owner or agent or charterer, in order to avoid loss, damage, delay, expense, or other disadvantage or danger to vessel, cargo, passengers or other interest, to wait at the port of shipment or elsewhere and/or, either with or without proceeding to or toward the port of discharge, or entering or attempting to

enter or discharge the goods there and whether such proceeding, entry or discharge be permitted or not, to proceed to or toward any other port or ports in or not in any route to destination and/or return to the port of shipment once or oftener, backwards or forwards in or not in any order of rotation, retaining the goods on board or discharging the same at risk and expense of the owners thereof at port of shipment or discharge or elsewhere at the first or any subsequent call, and shall thereupon be relieved of all responsibility in respect thereof, and full bill of lading freight, extra compensation for any additional service [fol. 27a] ice and any extra expense occasioned thereby shall be paid by shipper, consignee and/or assigns, and shall constitute a lien on the goods. The ship is free to carry contraband, explosives, munitions, war-like stores and may sail armed or unarmed, and with or without convoy. The carrier and master shall further be entitled to take such measures to lessen or avoid detention by belligerents, the risk of hostile attack, or other war dangers, as may be deemed appropriate, including the non-observance of any practices, rules or regulations, statutory or otherwise, which might be applicable in times of peace. In case the shipment listed in this bill of lading is seized, or threatened with seizure, by any belligerent, the carrier, for the purpose of avoiding loss, delay or detention to ship and/or cargo, may make such agreements as, in its sole discretion, are deemed prudent with the said belligerent with respect thereto."

(Here follow 2 photolithographs, side folios 28, 29)

PLAINTIFF'S EXHIBIT 11

U.S. GOVERNMENT

FINDING OFFICER

Transportation Branch

WE-310320

NWL-310320

Rm. 4117-1-1-1-1-1-1

U.S. Engineer Office, Mobile District, Mobile, Ala.

D. Gullatt, Col., Corps of Engineers

June 13, 1942

GOVERNMENT BILL
OF LADING

ORIGINAL

Received from District Engineer, Mobile District, Mobile, Alabama

by the Alcoa Steamship Company, Inc. the public property hereinafter described,

in apparent good order and condition (contents and value unknown), to be forwarded subject to conditions stated on the reverse hereof,

from Mobile, Alabama to Port of Spain, Trinidad

by the said company and connecting lines, there to be delivered in like good order and condition to The District Engineer,

U. S. Engineer Office, Port of Spain, Trinidad For: Walsh-Driscoll Company

via S/S GUNVOR, Voyage 37

MARKS	NUMBERS ON PACKAGES	NUMBER AND KIND OF PACKAGES	DESCRIPTION OF ARTICLES (Observe strictly carrier's freight classification. A valid trade or industrial name)	GROSS FEM	NET FEM
Ship to:			DRESSED YELLOW PINE		
The District Engineer		1,822 pcs.	2 x 4 - 12 - 20 R/L	20,620	
U. S. Engineer Office		1,196 "	2 x 4 - 12	9,568	
Port of Spain, Trinidad		900 "	2 x 4 - 14	8,400	
For: Walsh-Driscoll Co.		645 "	2 x 4 - 16	6,880	
WT.NO.W-958-enc-51		493 "	2 x 4 - 20	6,573	
		346 "	2 x 6 - 12 - 20 R/L	4,974	
MILITARY		1,901 "	2 x 6 - 16	30,416	
U.S. GOVERNMENT PROPERTY		94 "	2 x 8 - 12	1,504	
		82 "	2 x 8 - 16	1,749	
itencilled: WC-3565		340 "	2 x 8 - 20	9,067	
		42 "	2 x 12 - 12	1,008	

(Observe strictly carrier's freight classification. A valid trade or industrial name)

MARKS	NUMBERS ON PACKAGES	NUMBER AND KIND OF PACKAGES	DESCRIPTION OF ARTICLES (Observe strictly carrier's freight classification. A valid trade or industrial name)	GROSS FEM	NET FEM
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The District Engineer		1,822 pcs.	2 x 4 - 12 - 20 R/L	20,620	
U. S. Engineer Office		1,196 "	2 x 4 - 12	9,568	
Port of Spain, Trinidad		900 "	2 x 4 - 14	8,400	
For: Walsh-Driscoll Co.		645 "	2 x 4 - 16	6,880	
WT.NO.W-958-enc-51		493 "	2 x 4 - 20	6,573	
		346 "	2 x 6 - 12 - 20 R/L	4,974	
MILITARY		1,901 "	2 x 6 - 16	30,416	
U.S. GOVERNMENT PROPERTY		94 "	2 x 8 - 12	1,504	
		82 "	2 x 8 - 16	1,749	
itencilled: WC-3565		340 "	2 x 8 - 20	9,067	
		42 "	2 x 12 - 12	1,008	
		21,035 "	1 x 4 and 6	92,015	
		28,896 "		193,774 FEM	

Ocean Freight - \$3520.52

Freight payable on 135,642 FEM

Pick-up service at origin was not by the Government.

None car ordered ft. Also car furnished. A. Information Initials Car No.

TARIFF AUTHORITY (To be filled in by general office rendering account)

AUTHORITY FOR SHIPMENT

ALCOA STEAMSHIP COMPANY, INC.

June 13th 1942

CERTIFICATE OF ISSUING OFFICER

Contract No. W-958-enc-51 or Purchase Order No.

Mobile, Alabama

February 7

(If it is paid in advance)

(CARRIER'S RIGHTS TO SHIPPING CHARGES NOT AFFECTED BY THIS CERTIFICATE)

CONSIGNEE'S CERTIFICATE OF DELIVERY

I have this day received from ("S.S. 'Guvnor' has been lost due to enemy action.")

in apparent good order and condition, except as noted on the reverse hereof. Delivery service at destination was not by the Government.

Weight (In words) For the District Engineer, August 8, 1942

U.S. GOVERNMENT PROPERTY (To be filled in by general office rendering account)

U.S. GOVERNMENT PROPERTY (To be filled in by general office rendering account)

ADMINISTRATIVE DIRECTIONS

1. This bill of lading is to be used only for the shipment of goods by water or by air. It is not to be used for the shipment of goods by land.

2. The bill of lading is to be filled out by the shipper or by the carrier, as the case may be, and it is to be signed by the carrier.

3. The bill of lading is to be presented to the consignee or to the holder of the bill of lading, as the case may be, and it is to be accepted by the consignee or the holder of the bill of lading.

4. The bill of lading is to be used as evidence of the receipt of goods by the carrier and as evidence of the shipment of goods by the carrier.

5. The bill of lading is to be used as evidence of the title to the goods and as evidence of the ownership of the goods.

6. The bill of lading is to be used as evidence of the liability of the carrier for the goods and as evidence of the responsibility of the carrier for the goods.

7. The bill of lading is to be used as evidence of the condition of the goods and as evidence of the quality of the goods.

8. The bill of lading is to be used as evidence of the date of shipment of the goods and as evidence of the time of shipment of the goods.

9. The bill of lading is to be used as evidence of the place of shipment of the goods and as evidence of the point of shipment of the goods.

10. The bill of lading is to be used as evidence of the route of shipment of the goods and as evidence of the way of shipment of the goods.

11. The bill of lading is to be used as evidence of the mode of shipment of the goods and as evidence of the method of shipment of the goods.

12. The bill of lading is to be used as evidence of the means of shipment of the goods and as evidence of the vehicle of shipment of the goods.

13. The bill of lading is to be used as evidence of the manner of shipment of the goods and as evidence of the way of shipment of the goods.

14. The bill of lading is to be used as evidence of the means of shipment of the goods and as evidence of the vehicle of shipment of the goods.

15. The bill of lading is to be used as evidence of the manner of shipment of the goods and as evidence of the way of shipment of the goods.

SHIPPER'S CERTIFICATE, DAMAGE, OR SHRINKAGE

1. The shipper is hereby given the option to whom this bill of lading is to be issued, and the shipper is to be responsible for the shipment of the goods.

2. The shipper is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.

3. The shipper is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.

4. The shipper is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.

5. The shipper is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.

6. The shipper is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.

7. The shipper is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.

8. The shipper is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.

9. The shipper is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.

10. The shipper is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.

11. The shipper is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.

12. The shipper is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.

13. The shipper is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.

14. The shipper is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.

15. The shipper is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.

Description:

Weight of each article:

Invoice value or cost of repairs:

1. I certify that the facts stated above are correct.

By

GENERAL CONDITIONS AND INSTRUCTIONS

(29
72B)

CONDITIONS

1. It is hereby agreed and understood between the United States and the carrier that the carrier is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.
2. The carrier is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.
3. The carrier is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.
4. The carrier is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.
5. The carrier is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.
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13. The carrier is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.
14. The carrier is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.
15. The carrier is to be responsible for the shipment of the goods and for the condition of the goods at the time of shipment.

INSTRUCTIONS

1. Errors, interferences, or alterations in bills of lading must be authenticated and explained by the party making them.
2. Shipping order, original bill of lading, and memorandum bill of lading should be used in making a shipment. Only one original bill of lading will be issued for a single shipment. The shipping order should be furnished to the carrier. The original bill of lading and memorandum bill of lading should be signed by the agent of the receiving carrier. The original bill of lading and memorandum bill of lading should be returned to the consignee, and the original promptly mailed to the consignor. The consignor or agent of the consignor will sign the consignor's certificate on the original bill of lading and forward it to the carrier. The bill of lading then becomes the evidence upon which settlement for the carrier will be made. Memorandum copies of bills of lading may be used as administrative office copies.
3. In the absence of the consignor, or on his failure to accept, the person accepting will certify that he is authorized to do so, reciting such authority.
4. In no case will a second bill of lading be issued for a shipment, nor will a bill of lading be issued after the transportation has been performed. In case the bill of lading has been lost or destroyed, the carrier shall be furnished by the consignor with a "Certificate in Lieu of Lost Bill of Lading" on the standard form provided therefor, which shall finally consummate by acknowledgment of the "Certificate and Waiver by Transportation Company," and accompany the bill for services submitted by the carrier to the office charged with the shipment of the goods. Should the original bill of lading be located after settlement has been made on the certificate, it will be forwarded to the administrative office of the department concerned for transmittal to the General Accounting Office.
5. To insure prompt delivery of property, in the absence of the bill of lading, the consignor should give to the carrier a "Temporary Receipt" entered on the provided form for the property actually delivered. On the recovery of the bill of lading, or when the certificate provided for above shall have been given, settlement will be entered on said bill of lading or certificate of the fact of the delivery as per said temporary receipt, and the said temporary receipt will be entered with reference to the bill of lading or certificate sufficient to identify the same, and have papers attached and forwarded with the claim for payment thereon.
6. In case of loss or damage to property while in the possession of the carrier, such loss or damage shall, when practicable, be noted on the bill of lading or certificate in fact thereof, as the case may be, before the carrier's receipt. All practicable steps shall be taken at that time to determine the loss or damage and the liability therefor and to collect and forward to the proper officer, without delay, all evidence as to the same. Should the loss or damage not be discovered until after the bill of lading or certificate has been acknowledged, the carrier shall be held liable as soon as the loss or damage is discovered, and the agent of the carrier advised immediately of such loss or damage extending liability of transportation of shipment.
7. Bills must be submitted by the general offices of carriers, and on forms furnished by the Government to be obtained from the Public Printer, Washington, D. C.

[fol. 30a]

DEFENDANT'S EXHIBIT "A"

(Affidavit)

STATE OF NEW YORK,

County of New York, ss.:

WILLIS H. SWARTOUT being duly sworn, deposes and says:

That he prepared a Standard Form Public Voucher covering freight charges with respect to the following shipment:

Government Bill of Lading No.	We-310320
Carrier Bill of Lading No.	M-2209
Vessel	SS Gunvor
Voyage No.	Thirty-Seven (37)
Consignee	Dist. Engr., U. S. Engr. Office, Port of Spain, Trinidad For: Walsh- Driscoll
Amount of Freight	\$3520.52
Carrier's Invoice No.	G-1247
Port of Loading	Mobile, Ala.
Port of Destination	Port of Spain, Trinidad
Sailing Date	June 11, 1942.
Date Vessel Lost	June 14, 1942.

[fol. 31a] That the merchandise included in this bill of lading was delivered to the carrier, and was on board when the vessel was lost by enemy action;

That an original bill of lading covering this merchandise was signed by the steamship company, but has not been accomplished by consignee for the reason that the vessel was lost by enemy action while en route to destination;

That a photostatic copy of this bill of lading is attached hereto, nor accomplished bill of lading available for the reason as stated above;

That paragraph 6 of the carrier's commercial form of bill of lading provides in substance that full freight to destination, whether intended to be prepaid or collected at destination, is due and payable to the carrier as soon as the goods are received for the purpose of transportation, and that the same is deemed fully earned and due and payable before or after loading, goods or vessel lost or not lost;

That upon payment of the Public Voucher heretofore submitted and mentioned above, it is hereby agreed that in the event the original bill of lading is recovered, such bill of lading will be forwarded to the War Department, Finance Office, Washington, D. C. [fol. 32] and no further claim will be made for transportation charges thereon.

Willis H. Swartout, Chief Billing Clerk.

Subscribed and sworn to before me this 15th day of August, 1942. Edwin J. Maas, Notary Public, Queens Co. Clk. No. 1169, Reg. No. 5298, N. Y. Co. Clk. No. 19, Reg. No. 3-M-22. Commission expires March 30, 1943.

(Here follow 2 photolithographs, side folios 33, 33a)

74A

I certify that the above services were rendered as stated, and that they were necessary for the public service.

Approved for 0

(When original only)

1. *James O. Kinsley*

This ~~check~~ *check* is for U.S.A.

Paid by Check No. **100594**, dated **SEP 18 1948**, for **15.00** to **James O. Kinsley**, United States

INSTRUCTIONS TO CARRIERS

1. Payment for transportation of property, by freight or express, unless otherwise provided, will be made to the delivering carrier upon this voucher form, accompanied by the corresponding bills of lading, properly accepted; and, where land-grant deductions are involved, the basis or formula of arriving at the net amount claimed should be shown on the face of the voucher, unless this information has been furnished in connection with previous bills, in which case the basis or formula may be omitted until the basis is changed.

2. This form will be used for rendering bills for services performed over either land-grant or non-land-grant lines, but "Net rate" column need not be filled in except when land-grant or other allowances are deducted from gross rate. Bills involving land-grant deductions must not be rendered on the same voucher with those involving no land-grant deduction.

3. Transportation companies when billing on this form are requested to indicate on accompanying bills of lading, opposite each item, the class or commodity rate applied and refer to the tariffs and percentage sheets used. When payment is demanded for a full railroad or truck, the designation of the car by name and number should be shown, with the items included in each carload. When payment is demanded for service in a particular car or kind of car, the authority for use of such car should be shown.

4. Under caption "Rate" the commercial rate always should be shown in "Gross" column and when land-grant is involved, the net rate, arrived at by making proper land-grant deduction, should be shown in "Net" column. If for any reason it is impracticable for carriers to compute a net rate, the gross rate only will be shown and the net charges extended in "Amount" column but the formula used for arriving at the net charge should be shown on the face of the bill.

5. When additional charges, such as loading, wharfage, tolls, etc., are made a part of this account, they must be stated on separate lines, and if paid to other firm or corporation, to be designated by receipt.

6. Payment for transportation charge will be made only for the quantity of goods delivered at destination, except that in case of loss of weight from natural shrinkage on route and weight original, as shown by bill of lading, will be paid for, provided packages are delivered intact. Loss of damage for which a carrier is responsible will be deducted in making settlements for the service.

7. Accounts will be rendered separately for each bureau, office, or service of the respective Government departments and independent establishments, furnishing copies as required by each, as follows:

The Alaska Railroad and the Reclamation Service of the Department of the Interior, the Navy Department, the Bureau of Public Roads of the Department of Agriculture, the U. S. Maritime Commission, the Panama Canal, the Smithsonian Institution, the United States Customs (U. S. and Germany), and the Philippine China Commission require two memorandum copies of the voucher to accompany it.

The Tennessee Valley Authority requires the original and three memorandum copies of the voucher.

All the other bureaus or offices of the Government require the original and one memorandum copy of the voucher.

8. The voucher forms will be printed and distributed by the Government Printing Office, Washington, D. C. Transportation companies should make requisitions on the Public Printer, Government Printing Office, Washington, D. C., for as many copies as may be required.

9. Where more than one sheet is required for the statement of a bill, Carrier will use the "First and Follow Sheet," Form No. 10094.

10. When "First and Follow Sheets" are used, notation as to number of sheets that constitute the voucher should be entered in space provided therefor.

7. Accounts will be rendered separately for each bureau, office, or service of the respective Government departments and independent establishments, furnishing copies as required by each, as follows:

The Alaska Railroad and the Reclamation Service of the Department of the Interior, the Navy Department, the Bureau of Public Roads of the Department of Agriculture, the U. S. Maritime Commission, the Panama Canal, the Smithsonian Institution, the United States Customs (U. S. and Germany), and the Philippine China Commission require two memorandum copies of the voucher to accompany it.

The Tennessee Valley Authority requires the original and three memorandum copies of the voucher.

All the other bureaus or offices of the Government require the original and one memorandum copy of the voucher.

8. The voucher forms will be printed and distributed by the Government Printing Office, Washington, D. C. Transportation companies should make requisitions on the Public Printer, Government Printing Office, Washington, D. C., for as many copies as may be required.

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10. When "First and Follow Sheets" are used, notation as to number of sheets that constitute the voucher should be entered in space provided therefor.

[fol: 34] IN UNITED STATES COURT OF APPEALS

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander M. Bell, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the attached volume of copies of exhibits was used on the argument of the above entitled case in this Court.

Alexander M. Bell, Clerk. (Seal).

Dated July 22, 1949.

(4734)

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U. S.

FILED

AUG 16 1949

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

October Term, 1948

No. 271

271

ALCOA STEAMSHIP COMPANY, INC.,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT AND BRIEF IN SUPPORT
THEREOF**

MELVILLE J. FRANCE,
25 Broad Street,
New York 4, N. Y.
Counsel for Petitioner.

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Summary Statement of the Matters Involved	3
The Grounds on which the Decisions of the Courts Below Rested	5
Reasons Relied on for the Allowance of the Writ	6

BRIEF IN SUPPORT OF PETITION:

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Jurisdiction	11
Statement of Facts	12
Specification of Errors	12
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ARGUMENT:

The petitioner (who in this case is representative of every carrier carrying government goods on a government bill of lading) upon whose ship a government cargo was being carried under a government bill of lading, should be permitted to recover freight money from the government when its vessel and the cargo were lost by enemy action, where its commercial form of bill of lading provided that full freight "shall be deemed fully earned and due and payable to the Carrier * * * Goods or Vessel lost or not lost" 13

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IN THE
Supreme Court of the United States

October Term, 1948

No.

ALCOA STEAMSHIP COMPANY, INC.,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

*To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

Your petitioner, ALCOA STEAMSHIP COMPANY, INC., respectfully prays that a writ of certiorari issue to review an order and judgment of the United States Court of Appeals for the Second Circuit which was entered June 29th, 1949, and which reversed the final judgment of the United States District Court for the Southern District of New York, which was entered May 14, 1948, and dismissed the complaint herein.

Opinions Below

The opinion of the United States District Court for the Southern District of New York, LEIBELL, J. (Trans. Rec. p. 46) was filed on April 30, 1948 and is reported at 80 Fed. Supp. 158. The opinions in the Court of Appeals for the Second Circuit, prevailing opinion by L. HAND, C. J. and dissenting opinion by AUGUSTUS N. HAND, C. J. (Trans. Rec. p. 62) were filed on June 29, 1949, and have not been reported.

Jurisdiction

The order and judgment of the United States Court of Appeals for the Second Circuit, sought to be reviewed was entered June 29, 1949. Jurisdiction to issue the writ requested is found in Title 28, United States Code, Section 1254 (1).

Question Presented

The legal question presented involves the interpretation of the provisions of what is known as the Government Bill of Lading, approved by the Comptroller General August 24, 1928, and employed by the government in all its shipments by common carriers, and of the bill of lading of the carrier. Unless otherwise *specifically* provided or otherwise stated thereon the Government bill of lading is made subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

The precise question is whether a carrier, upon whose ship a government cargo was being carried under a government bill of lading, may recover freight money from the government when the vessel and cargo were lost by enemy action, where the carrier's commercial form of

bill of lading provided that full freight "shall be deemed fully earned and due and payable to the Carrier * * * Goods or Vessel lost or not lost." (Exhibit Volume p. 24a, Plaintiff's Exhibit 10).

Summary Statement of the Matters Involved

This is an action brought by the petitioner against The United States for the recovery under the Tucker Act (Title 28 U.S.C. §1346) of money earned as freight. The United States District Court found in favor of the petitioner and awarded judgment to it. The Court of Appeals for the Second Circuit by a divided court reversed the District Court.

The facts giving rise to the issue are as follows: On or about June 13, 1942 the War Department shipped a government cargo of lumber on the appellee's SS. Guxvor from Mobile, Alabama, to Port of Spain, Trinidad. While on her voyage with that cargo aboard, the ship was lost by enemy action on June 14, 1942. The War Department paid the petitioner's claim for freight; the Comptroller General took exception to the payment and subsequently deducted the amount of that payment from monies admittedly due the petitioner. The action herein was to recover the sum so withheld.

The more pertinent parts of the "government bill of lading" Standard Form No. 1058, approved by the Comptroller General of the United States August 28, 1924, upon which the lumber was shipped, are as follows:

"GENERAL CONDITIONS AND INSTRUCTIONS CONDITIONS

"It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

"1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier unless otherwise specifically stipulated.

"2 Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

.

"5. This shipment is made at the restricted or limited valuation specified in the tariff or classification at or under which the lowest rate is available, unless otherwise indicated on the face hereof.
 * * * (Plaintiff's Ex. 9, Ex. Vol. 23a).

The usual commercial form of bill of lading then in use by the petitioner contained the following provision as to freight:

"6. Full freight to destination whether intended to be prepaid or collected at destination, and all advance charges against the Goods are due and payable to ALCOA STEAMSHIP COMPANY, INC., as soon as the Goods are received for purposes of transportation; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or

after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid). Goods or Vessel lost or not lost.
 * * * (Plaintiff's Ex. 10, Ex. Vol. p. 24a).

The Grounds on which the Decisions of the Courts below Rested

There have been three opinions. In the District Court Judge LEIBELL holding for the petitioner, said:

"If there is nothing in the government's bill of lading, specifically providing to the contrary, i.e., that the freight shall not be earned and due and payable if the goods or vessel are lost, then the sum of \$3,520.52 was improperly deducted by the Comptroller General.

"The government contends that the provisions in paragraph 1 of the conditions and in paragraph 2 of the instructions, on the back of the government's bill of lading, are so clearly inconsistent with the provisions of paragraph 6 of the terms printed on the back of the carrier's bill of lading (all of which are quoted in the findings) as to bar the carrier from any claim for freight on any shipment which was not delivered at destination, even though delivery was made impossible through the destruction of the carrier's vessel by enemy action.

"I am of the opinion that the above mentioned provisions of the bills of lading are not inconsistent. The provisions of its own bill of lading cited by the government, have to do with the 'evidence' that must be presented by the carrier to collect freight showing delivery to the proper person when delivery of the shipment has been made. The provisions of the carrier's bill of lading, which declares that the freight is payable 'goods or vessel lost or not lost', covers the liability of the shipper for freight if there is no delivery at all because the

goods have been destroyed through no fault of the carrier. The two provisions can thus be given effect in respect to the situations to which they apply: the one where there is a delivery of the shipment; the other where the shipment is lost." (Trans. R. p. 46).

The prevailing opinion of the Court of Appeals was written by L. HAND, C. J., J. P. FRANK, C. J., concurring. The dissenting opinion was written by A. N. HAND, C. J.

The majority took the position that the government bill of lading did "specifically" bar payment by the United States if the goods were not in fact delivered to the consignee. That decision was principally based on grounds and assumptions which were not urged or discussed in the briefs or oral arguments. (We shall point out the errors of that opinion later).

The dissenting opinion of A. N. HAND, C. J. takes up, one by one, the reasons advanced by the majority opinion and answers them.

It is believed that a summary of the grounds of the several decisions is difficult and would if properly done take as much space as the opinions themselves.

Reasons Relied on for Allowance of Writ

1. The decision below touches the terms under which innumerable government shipments were made just prior to and during the late war. The consequences of error in that decision not only affect the instant case but may and will have far reaching and serious results where government cargos were lost because vessels were lost through enemy action.

2. The government still uses, as it has since 1928, the "government bill of lading". If the decision below

is erroneous, an error of law is perpetuated which will materially affect every carrier whose ship carries government cargo on a government bill of lading.

3. The decision below erroneously creates a preferred position for the government among shippers and is discriminatory in favor of the government contrary to statute.

The prevailing opinion assumes that any particular shipper, including the United States, may, by special agreement with the carrier, avail itself of some sort of "privilege" given by the admiralty law to require the carrier to transport the cargo on the old basis that freight is not earned and payable unless the goods are delivered by the carrier at destination.

Such an assumption has no foundation when the carrier's charges and established terms of carriage contemplate that the risk of loss of freight shall be upon the cargo owners. The assumption fails to take into account the provisions of Sections 16 and 17 of the Shipping Act, 1916 (46 U. S. C. Secs. 815, 816), which, among other things, make it unlawful for any common carrier by water to make or give any undue or unreasonable preference or advantage to any person in any respect whatever or to allow any person to obtain transportation at less than the regular rates or charges then established and enforced on the line of such carrier and which also forbid carriers to demand, charge or collect charges which are unjustly discriminatory between shippers.

It is therefore clear that where the carrier's terms of shipment and charges are based on freight being earned upon shipment and, therefore, at shipper's risk, it would be unlawful for the carrier to discriminate in favor of any particular shipper by assuming the freight risk, at

least without making a reasonable extra charge. Furthermore, such terms would have to be made available to all shippers desiring to take advantage of them.

The statute makes no exception exempting the Government from the duties which it imposes on carriers and shippers alike. Nor does the statute permit the carrier to discriminate in favor of the Government.

The decision of the Court below not only permits but requires the carrier to so discriminate.

4. The decision of the Court below as evidenced by the prevailing opinion is so erroneous that it should be reviewed by this Honorable Court. The opinion of the District Court and the dissenting opinion in the Court below clearly point up the errors and in simple justice there should be a review by this Honorable Court. Two judges have decided for the petitioner, two for the government. The issue in the instant case has never before been adjudicated.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Second Circuit, commanding that court to certify to and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 21319, Alcoa Steamship Company, Inc., Appellee, against United States of America, Appellant, and that the judgment of the said Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that

your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Dated: New York, N. Y., July 29th, 1949.

ALCOA STEAMSHIP COMPANY, INC.,
Petitioner.

By MELVILLE J. FRANCE,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1948

No.

ALCOA STEAMSHIP COMPANY, INC.,*Petitioner,**against***UNITED STATES OF AMERICA,***Respondent.*

BRIEF IN SUPPORT OF PETITION**Opinions Below**

The opinion of the United States District Court for the Southern District of New York (per Leibell, J.) (Trans. of R. p. 46) is reported at 80 Fed. Supp. 158.

The opinions in the United States Court of Appeals (Trans. of R. pp. 62-71) are not yet reported.

Jurisdiction

The order and judgment of the Court of Appeals for the Second Circuit sought to be reviewed was entered on June 29, 1949 (Trans. of R. p. 72).

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1).

Statement of Facts

The facts have been stated in the petition.

Specification of Errors

It is submitted that the Court below erred:

- (1) In reversing the decree of the District Court.
- (2) In dismissing the petition (complaint) of the petitioner.
- (3) In failing to hold that the bill of lading issued by the petitioner, providing for the payment of freight whether or not the vessel was lost, should prevail, because the clauses in the government bill of lading did not "specifically" provide otherwise.

Summary of Argument

The petitioner (who in this case is representative of every carrier carrying government goods on a government bill of lading) upon whose ship a government cargo was being carried under a government bill of lading, should be permitted to recover freight money from the government when its vessel and the cargo were lost by enemy action, where its commercial form of bill of lading provided that full freight "shall be deemed fully earned and due and payable to the Carrier * * * Goods or Vessel lost or not lost."

ARGUMENT.

The petitioner (who in this case is representative of every carrier carrying government goods on a government bill of lading) upon whose ship a government cargo was being carried under a government bill of lading, should be permitted to recover freight money from the government when its vessel and the cargo were lost by enemy action, where its commercial form of bill of lading provided that full freight "shall be deemed fully earned and due and payable to the Carrier * * * Goods or Vessel lost or not lost".

The Government Bill of Lading provides, among other conditions, the following:

"2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier." (Exhibit Vol. p. 23a, Exhibit 9).

Under the Carrier's bill of lading (Article 6 quoted in the Summary Statement in the petition p. 4) there is of course no doubt that recovery would be permitted to the petitioner.

The question is whether it is "*otherwise specifically provided or otherwise stated*" on the government bill of lading.

As the dissenting opinion of A. N. Hand, C. J. accurately states:

The provision for the payment of freight whether or not the vessel was lost "now general in commercial bills of

lading must govern 'unless otherwise specifically provided or otherwise stated' in the government bill of lading. In other words, the company bill of lading should prevail unless clauses in the bill of lading *prepared by the government and therefore to be construed against it in resolving any ambiguities*, 'specifically' have provided otherwise." (Emphasis supplied.)

What does "specifically" mean?

It means with exactness and precision! (Webster International.)

It certainly does not mean by inference, by assumption, by supposition, by surmise, by indirection!

When by the Government bill it was desired to avoid a short statute of limitations contained in the carrier's bill it "specifically" said so! (Condition 7 of Government Bill, Exhibit 9.) When by the Government bill it was desired to avoid prepayment of freight permitted under the carrier's bill, it "specifically" said so! (Condition 1 of Government Bill, Exhibit 9.)

Should the Government bill of lading be any less specific if it was desired to avoid payment of freight when the cargo was not delivered? As Judge Leibell says: "it (the government) could have done so in a single sentence providing that no freight shall be payable if the shipment is lost." On the contrary not only was such provision *not specifically made* but it was *specifically omitted*. Condition 7 of the government bill of lading states:

"7. In case of loss * * * in transit, the rules and conditions governing commercial shipments shall not apply as to period within which notice thereof shall be given the carrier or to period within which claim therefor shall be made or suit instituted." (Exhibit Vol. p. 23a, Exhibit 9.)

First and foremost it is submitted that the meaning of "specifically" has been completely overlooked in the prevailing opinion below. The court's argument is largely built upon assumption and inference. *It has even gone out of the record* and buttressed its conclusion with material improperly introduced in the respondent's brief in the Court below. We believe that it can be shown conclusively that the court below has completely disregarded the basic guide in this case: that unless *specifically* provided or otherwise stated in the government bill of lading the company bill of lading must prevail.

We shall discuss seriatim the several reasons for the conclusion of the Court below that the government bill of lading specifically overrode the provision of the carrier's bill of lading:

1. We consider unfounded the Court's conclusion that there is an inconsistency between the provision of the carrier's bill of lading that freight should be deemed earned on shipment and the provision of the Government bill of lading against collection of freight in advance or from the consignee. This conclusion is based not on any verbal inconsistency between the two provisions, *but wholly on the Court's assumption that there is no reasonable ground upon which to reconcile the two provisions.*

The Court suggests that there is "no reason why the United States * * * should wish to defer the payment of a claim which it must inevitably pay at some time".

In fact, an excellent reason is quite apparent to any one familiar with the cumbersome routine and delays inherent in the Government's own disbursing system. If the shipment or delivery of the Government's cargo were to be delayed pending the preparation and presentation

by the carrier and the auditing and payment of the Government vouchers necessary to obtain payment of advance or collect freight, it is obvious that the prompt despatch of the Government's shipments would be seriously jeopardized. To avoid such delays, the consequences of which might be especially grave in time of war, the Government bill of lading quite properly stipulates that the carrier shall not demand payment of its charges either in advance or at destination.

Thus a very practical and important effect can be given to Condition 1 of the Government bill of lading, without importing into its language any inconsistency whatever with the customary commercial stipulation in the carrier's bill of lading that the freight should be deemed earned on shipment. The latter stipulation affects merely the risk of loss, a subject on which the Government bill is entirely silent.

The Court's construction would do violence to the express purpose of Condition 2 of the Government bill, to make commercial terms govern the shipment unless they are "*specifically*" excluded by provisions or statements in the Government bill.

2. The Court below asserts that the Government bill of lading in that it states no "collection shall be made from the consignee", thus deprived the carrier of its ancient lien for freight. (As a matter of fact the company's bill of lading provided for its lien for freight and at most the Government bill of lading only "*specifically*" provided against such lien.)

The dissenting opinion of A. N. Hand, C. J. clearly shows the irrelevancy of this assertion:

"The agreement that freight charges were to be paid only after delivery in cases where the voyage

had been successfully accomplished did not in terms affect the substantive right of the carrier to earn and ultimately to receive the freight, and related only to time of payment. It is true that the clause presupposes the loss of the carrier's lien because the latter was bound to deliver the cargo, in the absence of excusable loss, and to look only to the government for payment. But the loss of a lien was quite unimportant when the government was the obligor."

3. The Court below has come to the conclusion that "Condition" Number 1 of the Government bill of lading, read with the second "Instruction", "together constitute a carefully devised plan by which the United States, . . . asserted the privilege of any shipper under the admiralty law that it should not pay for what it does not get . . ."

The Court went on to say:

"Nor is this result unjust to, or hard upon, the petitioner. The law throws upon all carriers the risk of performance, for performance is a condition upon the shipper's promise to pay, just as performance is always a condition upon payment in any contract of service. True, it has become general for carriers to reverse this, and throw the risk upon the shipper; but, although we do not know why this has happened, surely there is ground for supposing that it may have been because of the carrier's superior bargaining position. So far as it has become a well settled custom, the burden may be distributed by insurance with that as a datum; but it was not unnatural for the United States, if its own insurer, to wish to have the privileges which the law gives to shippers in general."

It is respectfully submitted that the Court's conclusion overlooks the importance in the transaction of the well settled commercial practice that freight is earned on shipment, and the effect of the second of the "Conditions" in the Government bill making it "subject to the same rules and conditions as govern commercial shipments".

The Court quite correctly found that it is a well settled custom or practice for carriers to stipulate, as did the carrier in this case, that freight shall be deemed earned on shipment and thus to shift to the shipper the risk of loss of the benefit of its freight payment if delivery of its cargo at destination should be prevented by causes for which the carrier is not liable.

The Court suggests that such customary shifting of the risk may have come about "Because of the carrier's superior bargaining position".

It is respectfully suggested that no basis has been shown for such a suggestion, but even if such were the true explanation of the origin of the practice, it would be wholly irrelevant. The important fact is that there was such a well established or general practice which was incorporated into the terms of the carrier's bill of lading and that the charges and risks of the carrier and shippers, respectively, had been adjusted on the basis of the existence of that practice at the time the shipment of appellant's lumber was made.

It is now too late for the carrier to protect itself by insurance against the risk of loss of its freight which the Court's present opinion would place upon the carrier contrary to well established commercial practices.

Furthermore the carrier in this case carried this shipment at the same rate as was charged for commercial shipments under its regular bills of lading making the freight

earned upon shipment. Thus the carrier would be deprived both of the opportunity to insure itself against the risk of loss of freight but also of the opportunity to require additional compensation for this unusual assumption of risk.

It is submitted that, having in mind the express provisions of the Government bill of lading incorporating commercial rules and conditions, a court should be most reluctant, yes, refuse to reach a result so at variance with customary practices, especially when, as in this case, the terms of the Government bill of lading do not expressly require that result, when there is nothing unreasonable in the commercial practice and when to disregard it would result in a discrimination between shippers.

4. There is nothing inconsistent in the terms of the Government bill of lading with the "freight earned on shipment" clause in the carrier's bill of lading, neither is that clause in any way unreasonable. For hundreds of years carriers' bills of lading have customarily provided against the assumption of certain risks; such as loss by peril of the sea, which the law would otherwise impose on them and shippers have customarily insured their goods against such risks. The situation is well understood and the only practical result is that one group of underwriters, rather than another, receives the premium for taking the risk.

Ocean transportation, like any other commercial service, can only be maintained if the charges of the carrier produce revenue sufficient to cover the carrier's expenses and risks and to produce a profit.

Before it became the practice to make freight earned on shipment, one of the risks which the carrier assumed was the risk of loss of his freight revenue from a voyage

if he were prevented from delivering the cargo at its destination. Of course, this risk could be and was covered by insurance on freight, the premiums for which became part of the carrier's operating expense. In times of war, such insurance would have to include war risk insurance which would involve heavy premiums at a time of great war risk such as 1942. Obviously, however, even if the former practice still prevailed the shippers of goods would have to pay the cost of such insurance as one of the elements going to make up the total transportation charges of the carriers.

The effect of the now established general commercial practice to shift this risk to the owner of the goods does not in any way increase the total cost of transportation, but merely eliminates the premiums on freight insurance as part of the carrier's charges to the shipper and puts them among the shipper's insurance costs. In either case, the cargo owner and eventually the general public pays for the insurance or assumes the risk as part of the overall cost of the goods.

The arrangement does have the advantage of eliminating separate insurance on freight, is convenient to the shipper in the common case of C.I.F. shipments, and it also simplifies the adjustment of losses on voyages where casualties occur, particularly the adjustment of general averages, because the interests in the adventure are reduced from three—(ship, cargo and freight)—to two, (ship and cargo).

Moreover, the shipowner does not escape from any obligation which the law may forbid him to escape because if the cargo is lost by a cause not lawfully excepted in the bill of lading, the carrier is liable to the cargo owner for the latter's loss, which includes the loss of the freight.

5. The decision of the Court below would result in an injustice to the carrier and an unlawful discrimination in favor of the government.

This has been developed at length in the Reasons relied on for Allowance of Writ in the petition (p. 7).

6. The prevailing opinion buttresses itself in part by using the support of proof which is not in the record.

The Attorney General's Office improperly incorporated in its brief and argument a part of a letter which formed no part of the record of the trial but which is referred to in the prevailing opinion (Trans. R. p. 65). That letter has nevertheless, no doubt unwittingly, been used to reach and fortify the conclusion in the prevailing opinion. This is not a case of judicial notice. The incorporation of that letter violates elementary rules of procedure and practice.

The dissenting opinion (A. N. Hand, C. J.) sets forth the fact as it is:

"Moreover, only two months before the shipment in the case at bar the Comptroller General made a ruling regarding a shipment by the United States to the Philippines which apparently arrived shortly before the Japanese took possession, where the government and commercial bills of lading were identical with those we have under consideration. The Secretary of the Navy had asked for instructions from the Comptroller General as to whether he should pay the freight where the vessel had reached the Philippines, but there was no proof that the cargo had been received by the consignee or that the latter had receipted for it upon the bill of lading. The instructions of the Comptroller to the Secretary were as follows:

"* * * you are advised that this office will not be required to object to the payment, otherwise proper of carrier's bills for transportation charges on shipments to the Philippine Islands or Guam in instances where the original bill of lading or other form of receipt showing delivery to the consignee cannot be obtained, if a satisfactory showing be made of facts or circumstances reasonably establishing the carriers' inability, by reason of war,

to effect delivery and obtain a receipt from the consignee, where the claim in each instance is supported by a memorandum copy or shipping order copy of the bill of lading showing the material shipped and corresponding in pertinent detail with the memorandum copy duly signed by the carrier's agent and retained administratively as contemplated in the instructions on the reverse of the original bill of lading. * * * [21 Comp. Gen. 909, 913.]

"Even though we do not regard the above ruling as controlling our interpretation of the bill of lading in the present case, it at least shows that the meaning of the government bill of lading was sufficiently doubtful to lead the Comptroller to treat the provisions of Condition 1 and instruction 2 as subject to exceptions and defenses where delivery could not be completed owing to war conditions."

It is submitted it appears clearly from the foregoing that the government bill of lading does not provide "*specifically*" against the collection of freight as provided and authorized in the carrier's commercial bill of lading. The Court below has fallen into serious error in the interpretation of a document which the United States is constantly using.

CONCLUSION.

A Writ of Certiorari Should be Granted.

Dated: New York, N. Y., July 29, 1949.

Respectfully submitted,

MELVILLE, J. FRANCE

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1949

No. 271

ALCOA STEAMSHIP COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA.

**BRIEF FOR ALCOA STEAMSHIP COMPANY, INC.,
PETITIONER**

MELVILLE J. FRANCE,
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New York 4, N. Y.,
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1949

No. 271

ALCOA STEAMSHIP COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA.

**BRIEF FOR ALCOA STEAMSHIP COMPANY, INC.,
PETITIONER**

Opinions Below

The opinion of the United States District Court for the Southern District of New York (R. p. 30) is reported at 80 F. Supp. 158. The opinion of the United States Court of Appeals for the Second Circuit (R. p. 40) is not yet reported.

Jurisdiction

The Judgment of the Court of Appeals was entered on June 29, 1949 (R. p. 46). The petition for a writ of certiorari was filed in this Court on August 16, 1949. Jurisdiction was invoked under 28 U. S. C. 1254 (1). Certiorari was granted by this Court on October 10, 1949.

Statement of Facts

The legal question presented involves the interpretation of the provisions of the "government bill of lading" and of the carrier's (Alcoa's) bill of lading. There are no disputed questions of fact. The disputed issue is whether on the undisputed facts the United States properly paid petitioner, Alcoa Steamship Company, \$3,520.52 for full ocean freight to destination on government cargo which was lost when petitioner's vessel, the SS. *Gunvor*, was torpedoed by a German submarine and sunk or whether the Comptroller General properly deducted that sum from an amount admittedly due the petitioner on other freight transactions.

The facts are briefly these:

On or before June 13, 1942, the War Department shipped a government cargo of lumber from Mobile, Alabama, to Port of Spain, Trinidad, on petitioner's SS. *Gunvor* (R. pp. 25, 29). On June 14th, 1942, while on her voyage with this cargo aboard, the *Gunvor* was lost by enemy action (R. p. 29). A claim for payment of freight on the lost government cargo was presented by the petitioner and on or about September 15, 1942 the War Department made payment of petitioner's claim in the amount of \$3,520.52 (R. p. 29). Upon audit of the account the Comptroller General of the United States excepted to the payment of that sum, and on July 24, 1944, the standard form, referring to the amount as an "overpayment" and advising that "a deduction will be made from an amount otherwise due your company", unless refunded within sixty days, was sent to the petitioner (R. p. 29). On February 2, 1946, refund not having been made, collection was effected by deduction (R. p. 29).

The statement of the Comptroller General as to this deduction was as follows:

"The government bill of lading on which the property was shipped contemplated payment upon presentation of said bill of lading showing delivery at destination. The bill of lading does not show delivery as contemplated and the record does not establish any requirement for payment otherwise. Consignee's Certificate of Delivery states 'SS. Gunvor has been lost due to enemy action'." (R. p. 65)

The more pertinent parts of the "government bill of lading" Standard Form No. 1058, approved by the Comptroller General of the United States August 28, 1924, are as follows (R. pp. 25-27):

"GENERAL CONDITIONS AND INSTRUCTIONS

CONDITIONS

"It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

"1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

"2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

"5. This shipment is made at the restricted or limited valuation specified in the tariff or classification at or under which the lowest rate is available, unless otherwise indicated on the face hereof.
 * * *

"INSTRUCTIONS

* * * *

"2. Shipping order, original bill of lading, and memorandum bill of lading should be used in making a shipment. Only one original bill of lading will be issued for a single shipment. The shipping order should be furnished the initial carrier. The original bill of lading and memorandum copies should be signed by the agent of the receiving carrier, returned to the consignor, and the original promptly mailed to the consignee. The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. * * *

"6. In case of loss or damage to property while in the possession of the carrier, such loss or damage shall, when practicable, be noted on the bill of lading or certificate in lieu thereof, as the case may be, before its accomplishment. * * *

The form of "Consignee's certificate" referred to in Instruction No. 2 provides as follows (R. 27):

"CONSIGNEE'S CERTIFICATE OF DELIVERY

"I have this day received from _____
 _____ (name of transportation company) at _____ (actual point of delivery by carrier) the public property described in this bill of lading, in apparent good

order and condition, except as noted on the reverse hereof. Delivery service at destination was/was not by the Government.

Weight _____ pounds. _____
(in words) (in figures)

(Consignee)

(Date)

This certificate of delivery was endorsed "SS. *Gunvor* has been lost due to enemy action" and signed "For the Acting District Engineer (signature illegible), Superintendent, August 8, 1942" (Ex. 11, R. p. 72A).

The usual form of bill of lading then in use by the petitioner contained the following provision as to freight:

"6. Full freight to destination whether intended to be prepaid or collected at destination, and all advance charges against the Goods are due and payable to ALCOA STEAMSHIP COMPANY, INC., as soon as the Goods are received for purposes of transportation; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid), Goods or Vessel lost or not lost * * *" (R. p. 69).

Specification of Errors

The Court below erred:

1. In reversing the decree of the District Court;
2. In dismissing the complaint of the petitioner;

3. In failing to hold that the commercial bill of lading used by the petitioner, providing for the payment of freight whether or not the vessel was lost, should prevail, because such provision was incorporated in the government bill of lading and the government bill of lading did not specifically provide otherwise.

ARGUMENT

The petitioner, upon whose ship a government cargo was carried on a government bill of lading is entitled to recover freight money from the government when its vessel with its cargo was lost by enemy action, where its commercial form of bill of lading provided that full freight "shall be deemed fully earned and due and payable to the Carrier * * * Goods or Vessel lost or not lost".

I

Preliminary Guiding Tests

(a)

The basic guide in this case is that unless otherwise specifically provided or otherwise stated in the government bill of lading the company bill of lading must prevail.

Under the Carrier's bill of lading (Article 6 quoted on page 5 hereof, also Petitioner's Exhibit 10, R. p. 69) if that only were involved, there would be of course no doubt that recovery would be permitted to the petitioner.

Now the government bill of lading provides, among other conditions, the following:

"2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject

to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier" (Petitioner's Exhibit 9, R. p. 68B).

The question is whether it is "otherwise *specifically* provided or otherwise stated" on the government bill of lading.

The trial court stated the issue concisely (R. p. 30):

"If there is nothing in the government's bill of lading, *specifically* providing to the contrary, i.e., that the freight shall not be earned and due and payable if the goods or vessel are lost, then the sum of \$3,520.52 was improperly deducted by the Comptroller General." (Emphasis supplied.)

The dissenting opinion of A. N. Hand, C. J., reiterated the issue (R. p. 44):

The provision for the payment of freight whether or not the vessel was lost "now general in commercial bills of lading must govern 'unless otherwise specifically provided or otherwise stated' in the government bill of lading. In other words, the company bill of lading should prevail unless clauses in the bill of lading prepared by the government and therefore to be construed against it in resolving any ambiguities, '*specifically*' have provided otherwise." (Emphasis supplied.)

What does "specifically" mean?

It means with exactness and precision! (Webster International).

It means in a specific manner; with specific mention; explicitly; definitely; particularly! (New Century Dictionary).

It certainly does not mean by inference, by assumption, by supposition, by surmise, by indirection.

When by the government bill of lading it was desired to avoid a short statute of limitations contained in the carrier's bill it "specifically" said so. Condition 7 of the government bill states:

"7. In case of loss . . . in transit, the rules and conditions governing commercial shipments shall not apply as to period within which notice thereof shall be given the carrier or to period within which claim therefor shall be made or suit instituted" (Ex. 9; R. p. 8B).

When by the government bill of lading it was desired to avoid prepayment of freight permitted under the carrier's bill, it "specifically" said so! Condition 1 of the government bill states:

"1. Prepayment of charges shall in no case be demanded by the carrier . . ." (Ex. 9).

Is there any reasonable ground to believe that the government bill of lading would be any less specific if it was desired to avoid payment of freight when the cargo was not delivered? As the trial judge says:

" . . . it (the government) could have done so in a single sentence providing that no freight shall be payable if the shipment is lost" (R. p. 33).

On the contrary not only was such provision *not specifically made but it was specifically omitted.*

Again as the trial judge says:

"In construing the provisions of the bills of lading in relation to the shipment on the SS. Gunvor we may take judicial notice of the fact that in June, 1942 there was real danger of loss of vessel in the Caribbean due to the activity of enemy submarines.

The bill of lading of the carrier contained a war clause (par. 30) to the effect that 'this shipment is at the sole risk of the owners thereof, of all risks of war' including 'sinking by exploding mines, torpedoes, or otherwise'. The government needed the lumber shipped on the SS. Gunvor in the construction of war bases at Trinidad. The carrier was willing to undertake the carriage in an area of war activity. If the carrier was to be deprived of its rights under the clause that freight was payable 'Goods or vessel lost or not lost', that should have been clearly and specifically stamped thereon or stated in the government's printed bill of lading, as it did in paragraph 7 of the printed conditions of the government's bill of lading" (R. p. 34).

(b)

Clauses in the bill of lading prepared by the government are to be construed against it in resolving any ambiguities.

The "government bill of lading" involved in this cause is "Standard Form No. 1058, approved by the Comptroller General of the United States August 28, 1924" (Ex. 9, R. p. 68A).

The petitioner had nothing to do with the preparation and wording of this document. Like all carriers it had no choice in the use of the government bill.

We do not think that any ambiguities are involved but if there be such then in the words of the dissenting judge in the court below:

"The company bill of lading should prevail unless clauses in the bill of lading prepared by the government and therefore to be construed against it in resolving any ambiguities, 'specifically' have provided otherwise" (R. p. 44).

(c)

The Solicitor General's employment of the general maritime rule that freight is not earned until delivery of goods to proper person at destination to buttress his argument and to ask impliedly a shifting of the burden of proof in the interpretation of the documents involved, is unsound.

To require that ambiguities, if they exist, in the government bill of lading, a document prepared by the government, are to be resolved against the petitioner, is contrary to established principle.

As the dissenting opinion in the court below states:

"I cannot see that the general maritime rule that freight is not earned until cargo is delivered has anything to do with such a situation as we have here. That rule does not apply to cases where there is an agreement to the contrary" (R. p. 44).

The issue in this cause still remains as stated by him:

"The company bill of lading should prevail unless clauses in the company bill of lading prepared by the government, and therefore to be construed against it in resolving any ambiguities, 'specifically' have provided otherwise" (R. p. 44).

II

There are no inconsistencies between the "conditions" and "instructions" of the government bill of lading and "clause 6" of the petitioner's bill of lading. There is no specific provision nor any statement contained in the government bill of lading which runs counter to "clause 6" of petitioner's bill of lading in so far as it provided that freight was earned "Goods or Vessel lost or not lost".

The government has contended that Paragraph "1" of the "Conditions" and Paragraph "2" of the "Instructions" of the government bill of lading are so clearly inconsistent with the provisions of clause "6" of the petitioner's bill of lading as to bar the carrier (petitioner) from any claim for freight on a shipment which was not delivered at destination, even though delivery was made impossible through the destruction of the petitioner's vessel by act of the public enemy.

There is no inconsistency. Referring to paragraph No. 1 of the Government form of bill of lading, prepayment of charges has not been demanded by the carrier nor has the petitioner sought to make collection from the consignee.

The second sentence of paragraph 1 of the "conditions" provides that payment will be made to the last carrier (unless otherwise specifically stipulated) on presentation to the proper office of the bill of lading "properly accomplished", attached to freight voucher prepared on the authorized Government form.

The only question which requires consideration, therefore, is whether the bill of lading was "properly accom-

plished" in view of the fact that the ship carrying the goods was sunk by enemy action before reaching destination.

There is no suggestion of any improper act or fault on the part of the petitioner. The case is purely one of loss by the act of the public enemy, for which the petitioner is not liable or responsible by the terms of the bill of lading; indeed, there would be no-liability or responsibility in such a case even in the absence of the bill of lading clauses. *Hutchinson on Carriers*, 3rd Edition, §314.

The Government bill of lading does not state that the goods must be delivered at destination in order to entitle the carrier to freight. It states merely that the bill of lading must be "properly accomplished," and if the ship and goods are destroyed by the public enemy prior to the time of delivery, a possibility foreseen and provided for in the carrier's bill of lading form, then the Government bill of lading has been within the language of paragraph No. 1 "properly accomplished." It would seem that the language of the government bill of lading has been chosen with some care so as not to impose, in a proper case, the requirement of delivery upon the carrier.

Examination of the government bill of lading shows that the clause upon which the Comptroller General depends had to do with the *method* of payment and has no relation to nor has it to do with terms of the carrier's bill of lading which are incorporated. As the court below said these provisions "have to do with the 'evidence' which must be presented by the carrier to collect freight showing delivery to the proper person when delivery of the shipment has been made."

Condition "1" of the Government bill of lading states:

"1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face thereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, *payment will be made to the last carrier, unless otherwise specifically stipulated.*" (Emphasis supplied.)

Clearly this language outlines the normal procedure for obtaining payment by the carrier.

That "accomplished" means the surrender of the bill of lading and nothing else appears by reference to Instruction 6 set forth on the same page of the government bill, which reads as follows:

"6. In case of loss or damage to property while in the possession of the carrier, such loss or damage shall, when practicable, be noted on the bill of lading or certificate in lieu thereof, as the case may be *before its accomplishment.* * * * Should the loss or damage not be discovered until after the *bill of lading or certificate has been accomplished* * * *".

There is no requirement in the government form bill of lading unconditionally requiring delivery at the named or any other "destination". "Accomplished" is a term of art that must be construed in its usual commercial sense and in common maritime usage. "Accomplishment" of a bill of lading merely means the surrender to the carrier by the consignee or other authorized holder upon the completion of the transaction. In such circumstances the original bill of lading is considered "accomplished", and the effect of such "accomplishment" is that any duplicate original

stands void. *Carrier on Carriage of Goods by Sea* (8th Ed.), Sec. 502. That is the sense in which the word "accomplished" is used in the case of a bill of lading. The term is an ancient one; the early bills of lading customarily stated: "In Witness Whereof, the Master or Agent of said vessel hath affirmed to 4 Bills of Lading, all of this tenor and date, one of which being accomplished, the others stand void." It does not mean, nor is it conditioned upon, the accomplishment or completion of the voyage as originally intended, although the Comptroller General appears to have understood that it does.

Neither Clause 1 nor Clause 2 of Condition "1" of the government form bill of lading requires "accomplishment" at destination, nor do these clauses require carriage to the originally intended destination as a condition precedent to payment of freight. The government bill of lading is against "demand" by the carrier for "prepayment of charges" and against "collection" from the consignee (Clause 1). "Collection" is conditioned on "presentation to the office indicated * * * of this bill of lading, properly accomplished, attached to a freight voucher * * *". Collection after discharge of the cargo thus should only require presentation of the "properly accomplished" (i.e., endorsed and surrendered) bill of lading and the requisite voucher to the office indicated.

The second condition of the government bill of lading provides:

"2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided by the carrier."

Paragraph 6 of the carrier's bill of lading, thus incorporated, provides as follows:

"Full freight to destination, whether intended to be prepaid or collected at destination, and all advance charges against the Goods are due and payable to ALCOA STEAMSHIP COMPANY, INC., as soon as the Goods are received for purposes of transportation; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid), Goods or Vessel lost or not lost."

There is nothing in the government bill of lading "otherwise *specifically* provided or stated."

Prepayment of freight cannot be demanded but full freight "shall be deemed fully earned * * * Goods or Vessel lost or not lost." Certainly there is nothing in the government bill which contravenes this provision of the carrier's bill.

Even in the sense in which the Comptroller General seeks to interpret "properly accomplished" (which we have shown to be erroneous), the carriage of the goods involved *was properly accomplished within the terms and conditions of the carrier's bill of lading*. The goods were lost through "act of war; act of public enemies" for which the carrier was exonerated. So far as the carrier was concerned,—its duties and obligations to perform,—it had met all such obligations, it had properly "accomplished"

(even as construed by the Comptroller General) all its duties in the premises.

In Vol. 24, Decisions of the Comptroller of the Treasury, page 707, the Comptroller of the Treasury rendered an opinion to the Secretary of the Navy under date of May 27, 1918, that payment of ocean freight charges would be due although the vessel carrying the goods was sunk.

The opinion refers to prior correspondence in which the Director of Operations of the United States Shipping Board Emergency Fleet Corporation had advised the Navy Department that rates of freight were established on the understanding that all freight was prepaid and that, if payment could not be made without waiting for accomplished bills of lading at the port of discharge, the freight would have to be insured and the cost of the insurance added to the ocean freight rate. The opinion of the Comptroller then quotes a letter of Cosmopolitan Shipping Co., Inc. to the Navy Department as follows (p. 708):

“In connection with these bills, we understood over the telephone this afternoon that you could not make payment until accomplished bills of lading are returned to you by the consignee. If this is correct we would thank you to advise us what the effect would be in case the vessel is lost and the cargo not delivered, also what would be the effect if the cargo is delivered and the bills of lading are lost in the mail en route from Europe to the United States.”

After referring to the fact that ordinarily payment of transportation charges was to be made only on proof of delivery to the consignee at destination, the opinion of the Comptroller concludes (p. 709):

“But in the case now under consideration the transportation company may be relieved of loss or

damage under certain conditions, under which the loss would fall upon the Government because of its policy of not insuring its property, whether stationary or in transit. The freight is likewise not insured by the Government.

"The liability of the Government for freight charges would therefore arise when the shipment is actually made, whether delivered to the destination or lost with the destruction of the vessel."

"Section 3648, Revised Statutes, prohibits payment in excess of the service rendered. Under the circumstances outlined in the case the service required to be performed and for which payment may be made is the delivery of the property to the consignee or an excusable failure to make such delivery, evidence of one or the other of which should be furnished." (Emphasis supplied.)

The above opinion was approved in an opinion of the Comptroller General of April 7, 1942, Vol. 21, Comp. Gen. 909.

In the opinion of April 7, 1942, *supra*, addressed to the Secretary of the Navy, the Comptroller General authorized payment of freight on shipments destined to the Philippines or Guam if a satisfactory showing could be made of facts or circumstances reasonably establishing the carrier's inability by reason of war to effect delivery. This opinion reads, in part (p. 913):

"In any event, it would appear that where the carrier claims charges without showing delivery of the shipment it reasonably may be required to show what particular facts or circumstances it relies upon as relieving it from the duty to effect delivery and obtain receipt from the consignee, and to certify that so far as known the shipment would have been delivered but for such facts and circumstances. See decision of May 27, 1918, 24 Comp. Dec. 707."

It is obvious that had the SS. *Gunvor* not been destroyed by German naval action, the shipments would have been delivered at destination. The decision of the Comptroller General just referred to shows that a signature by the consignee showing receipt of the goods is not of the essence where acts of war make delivery impossible.

In a letter dated May 11, 1944, addressed by the Comptroller General of the United States to the Administrator, War Shipping Administration, certain procedure proposed by the War Shipping Administration is approved. The Comptroller General wrote:

"In prescribing the use of the War Shiplading 7/1/42 for ocean shipment by office letter of August 31, 1943, A24222, full consideration was given to the commercial maritime agreement of long standing that transportation charges are earned and payable, or payment to be properly guaranteed, on loading, ship or cargo lost or not lost."

After quoting paragraph 15 of the "War Shiplading" which resembles paragraph 6 of plaintiff's bill of lading above quoted, the Comptroller General continued:

"Under such terms it would appear that the accomplishment of the bill of lading by the receiver of the goods is not a condition necessary to the collection of the freight charges since such charges are earned and payable on loading. By the same reasoning, the payment of the freight charges does not constitute payment in advance of services rendered since the accomplishment of the certificate hereinafter prescribed on the copy of the on-board bill of lading may be accepted as prima facie evidence that the cargo was loaded and freight charges earned. Commercial shippers generally cover the transportation charges by insurance and as it has

been held that the Government should be its own insurer, there appears to be no reason why the Government should deviate from uniform maritime practice in the payment of freight charges, particularly under present ocean shipping conditions."

The legal rule that freight may be earned although the goods are never delivered is well established. In *Allanwilde Transport Corp. v. Vacuum Oil Company*, 248 U. S. 377, the Supreme Court said, in upholding a contract that freight was to be considered earned, vessel lost or not lost (p. 385):

"There were expected hazards and contingencies in the adventure and we must presume that the contract was framed in foresight of both and in provision for both. We cannot step in with another and different accommodation."

Other Supreme Court decisions further supporting the conclusions reached in the *Allanwilde* case include:

International Paper Co. v. The Gracie D. Chambers, 248 U. S. 387;

Standard Varnish Works v. The Bris, 248 U. S. 392.

In *The Quarrington Court*, 122 F. (2d) 266, 268 (C.C.A. 2, 1941), the Court said:

"The provision that freight was payable on destination does not override the provision that it is to be paid regardless of the loss of the ship."

See, too, *Portland Flouring Mills v. British & For. Mar. Inc. Co.*, 130 Fed. 860 (C.C.A. 9).

III

The errors of the opinion of the Court below in reaching the conclusion that the government bill of lading specifically overrode the provision of the carrier's bill of lading.

1. We consider unfounded the conclusion of the Court below that there is an inconsistency between the provision of the carrier's bill of lading, that freight should be deemed earned on shipment and the provision of the Government bill of lading against collection of freight in advance or from the consignee. This conclusion is based not on any verbal inconsistency between the two provisions, but *wholly on the Court's assumption that there is no reasonable ground upon which to reconcile the two provisions.*

The Court suggests that there is "no reason why the United States . . . should wish to defer the payment of a claim which it must inevitably pay at some time".

In fact, an excellent reason is quite apparent to any one familiar with the cumbersome routine and delays inherent in the Government's own disbursing system. If the shipment or delivery of the Government's cargo were to be delayed pending the preparation and presentation by the carrier and the auditing and payment of the Government vouchers necessary to obtain payment of advance or collect freight, it is obvious that the prompt despatch of the Government's shipments would be seriously jeopardized. To avoid such delays, the consequences of which might be especially grave in time of war, the Government bill of lading quite properly stipulates that the carrier shall not demand payment of its charges either in advance or at destination.

Thus a very practical and important effect can be given to Condition 1 of the Government bill of lading, without importing into its language any inconsistency whatever with the customary commercial stipulation in the carrier's bill of lading that the freight should be deemed earned on shipment. The latter stipulation affects merely the risk of loss, a subject on which the Government bill is entirely silent.

The Court's construction would do violence to the express purpose of Condition 2 of the Government bill, to make commercial terms govern the shipment unless they are "specifically" excluded by provisions or statements in the Government bill.

2. The Court below asserts that the Government bill of lading in that it states no "collection shall be made from the consignee", thus deprived the carrier of its ancient lien for freight. (As a matter of fact the company's bill of lading provided for its lien for freight and at most the Government bill of lading only, "specifically" provided against such lien.)

The dissenting opinion of A. N. Hand, C. J. clearly shows the irrelevancy of this assertion:

"The agreement that freight charges were to be paid only after delivery in cases where the voyage had been successfully accomplished did not in terms affect the substantive right of the carrier to earn and ultimately to receive the freight, and related only to time of payment. It is true that the clause presupposes the loss of the carrier's lien because the latter was bound to deliver the cargo in the absence of excusable loss, and to look only to the government for payment. But the loss of a lien was quite unimportant when the government was the obligor." (R. p. 45)

3. The Court below has come to the conclusion that "Condition" Number 1 of the Government bill of lading, read with the second "Instruction", "together constitute a carefully devised plan by which the United States, * * * asserted the privilege of any shipper under the admiralty law that it should not pay for what it does not get * * *."

The Court went on to say:

"Nor is this result unjust to, or hard upon, the petitioner. The law throws upon all carriers the risk of performance, for performance is a condition upon the shipper's promise to pay, just as performance is always a condition upon payment in any contract of service. True, it has become general for carriers to reverse this, and throw the risk upon the shipper; but, although we do not know why this has happened, surely there is ground for supposing that it may have been because of the carrier's superior bargaining position. So far as it has become a well settled custom, the burden may be distributed by insurance with that as a datum; but it was not unnatural for the United States, if its own insurer, to wish to have the privileges which the law gives to shippers in general." (R. p. 42)

It is respectfully submitted that the Court's conclusion overlooks the importance in the transaction of the well settled commercial practice that freight is earned on shipment, and the effect of the second of the "Conditions" in the Government bill making it "subject to the same rules and conditions as govern commercial shipments".

The Court quite correctly found that it is a well settled custom or practice for carriers to stipulate, as did the carrier in this case, that freight shall be deemed earned on shipment and thus to shift to the shipper the risk of loss of the benefit of its freight payment if delivery of its

cargo at destination should be prevented by causes for which the carrier is not liable.

The Court suggests that such customary shifting of the risk may have come about "Because of the carrier's superior bargaining position".

It is respectfully suggested that no basis has been shown for such a suggestion, but even if such were the true explanation of the origin of the practice, it would be wholly irrelevant. The important fact is that there was such a well established or general practice which was incorporated into the terms of the carrier's bill of lading and that the charges and risks of the carrier and shippers, respectively, had been adjusted on the basis of the existence of that practice at the time the shipment of appellant's lumber was made.

It is now too late for the carrier to protect itself by insurance against the risk of loss of its freight which the Court's present opinion would place upon the carrier contrary to well established commercial practices.

Furthermore the carrier in this case carried this shipment at the same rate as was charged for commercial shipments under its regular bills of lading making the freight earned upon shipment. Thus the carrier would be deprived both of the opportunity to insure itself against the risk of loss of freight but also of the opportunity to require additional compensation for this unusual assumption of risk.

It is submitted that, having in mind the express provisions of the Government bill of lading incorporating commercial rules and conditions, a court should be most reluctant, yes, refuse to reach a result so at variance with customary practices, especially when, as in this case, the terms of the Government bill of lading do not expressly

require that result, when there is nothing unreasonable in the commercial practice and when to disregard it would result in a discrimination between shippers.

4. There is nothing inconsistent in the terms of the Government bill of lading with the "freight earned on shipment" clause in the carrier's bill of lading, neither is that clause in any way unreasonable. For hundreds of years carriers' bills of lading have customarily provided against the assumption of certain risks, such as loss by peril of the sea, which the law would otherwise impose on them and shippers have customarily insured their goods against such risks. The situation is well understood and the only practical result is that one group of underwriters, rather than another, receive the premium for taking the risk.

Ocean transportation, like any other commercial service, can only be maintained if the charges of the carrier produce revenue sufficient to cover the carrier's expenses and risks and to produce a profit.

Before it became the practice to make freight earned on shipment, one of the risks which the carrier assumed was the risk of loss of his freight revenue from a voyage if he were prevented from delivering the cargo at its destination. Of course, this risk could be and was covered by insurance on freight, the premium for which became part of the carrier's operating expense. In times of war, such insurance would have to include war risk insurance which would involve heavy premiums at a time of great war risk such as 1942. Obviously, however, even if the former practice still prevailed the shippers of goods would have to pay the cost of such insurance as one of the elements going to make up the total transportation charges of the carriers.

The effect of the now established general commercial practice to shift this risk to the owner of the goods does not in any way increase the total cost of transportation, but merely eliminates the premiums on freight insurance as part of the carrier's charges to the shipper and puts them among the shipper's insurance costs. In either case, the cargo owner and eventually the general public pays for the insurance or assumes the risk as part of the overall cost of the goods.

The arrangement does have the advantage of eliminating separate insurance on freight, is convenient to the shipper in the common case of C.I.F. shipments, and it also simplifies the adjustment of losses on voyages where casualties occur, particularly the adjustment of general averages, because the interests in the adventure are reduced from three—(ship, cargo and freight)—to two (ship and cargo).

Moreover, the shipowner does not escape from any obligation which the law may forbid him to escape because if the cargo is lost by a cause not lawfully excepted in the bill of lading, the carrier is liable to the cargo owner for the latter's loss, which includes the loss of the freight.

IV

Answering some anticipated contentions of the respondent.

1. The "Instructions" contained on the back of the "Public Voucher for Transportation of Freight or Express" (Ex. B, R. 74B) form no part of the government bill of lading. They constitute no part of the terms of carriage.

2. We have pointed out what the term "accomplished", really a term of the art, means in dealing with bills of lading. Just as did the Comptroller General so the government in its briefs heretofore filed, confuses the term with "carriage of goods to destination". It is improperly insisting that performance under contract can only be made in one way. The petitioner very properly says it has performed its contract as made and accordingly entitled to payment in accordance with its terms.

V

As to the application and effect of revised statutes 3648 (31 U. S. Code Sec. 529).

In the Court below the government raised the question of the prohibition of advance payments under R. S. 3648. 31 U. S. Code Sec. 529 provided in part as follows:

— "Advances of public moneys; prohibition against. Except as otherwise provided by law, no advance of public money shall be made in any case. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment."

Concededly the government form bill of lading in its clause 1, prohibits demand by the carrier of prepayment of freight and this conforms to the foregoing statute. However, no request for prepayment is involved here.

The payment made did not exceed the value of the service contracted for. Counsel for government seems to think—at least it has so stated,—that because the

petitioner did not carry the respondent's cargo to the appointed destination the value of the service rendered was "nil". This is not even plausible. "Value" may be fixed by agreement as it was here and cannot be judged by subsequent events. In this case the petitioner's services were valued by the parties at the rates stipulated in the contract, and in arriving at that value (the agreed freight) no exception was made to the clauses protecting the carrier in respect of war risks.

The petitioner's bill of lading, paragraph 30, provided:

"It is mutually agreed, that in addition to the other terms and conditions of the bill of lading which shall be deemed affected only so far as inconsistent herewith, this shipment is at the sole risk of the owners thereof, of all risks of war, preparation for war, arrest, restraint, capture, seizure, destruction, detention, sinking by explosive mines, torpedoes, or otherwise, interference or hostilities on the part of any Power and of all consequence thereof. * * * (Ex. 10, R. p. 70).

In *McClure v. United States*, 19 Ct. Claims 173, cited in government's brief, the Court of Claims said:

"This statute (R. S. 3648) was intended to prevent a department from anticipating the *performance of an agreement*, by keeping the payment within the value of the service, and does not apply when there is a complete performance, although the government may not have received any benefit in consequence of the destruction of the subject matter of the agreement.

"The Claimants were not insurers * * *, and it being * * * without their fault the consequences must not fall on them."

The value of the services performed by the petitioner was stipulated in the contract of carriage, viz., the government bill of lading which was subject to the conditions of the petitioner's commercial form bill of lading. The service was to carry the goods to destination, subject, however, to their loss by acts of war. Under such conditions the freight was necessarily at the risk of one or the other of the parties. By the contractual provisions of the petitioner's bill of lading, a part of the agreement between the parties, the risk of loss fell upon the government, the shipper.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be reversed and that of the District Court should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 271

ALCOA STEAMSHIP COMPANY, INC., PETITIONER

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 46) is reported at 80 F. Supp. 158. The opinion of the United States Court of Appeals for the Second Circuit (R. 62) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1949 (R. 72). The petition for a writ of certiorari was filed on August 16, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the standard form Government bill of lading permits payment to an ocean carrier of freight to destination on Government cargo which is lost and never delivered.

STATUTE AND CONTRACT PROVISIONS INVOLVED

The statute prohibiting advance payments, R. S. 3648, 31 U. S. C. 529, provides in pertinent part as follows:

No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *

The standard form Government bill of lading (Form No. 1058, approved August 24, 1928; 8 Comp. Gen. 698) (Ex. 11, R. 28a-29a) and the usual commercial ocean bill of lading are printed in pertinent part, *infra*, pp. 5-9.

STATEMENT

This action was brought by petitioner against the United States for the recovery, under the Tucker Act, 28 U. S. C. 1346, of \$3,520.52 which the Comptroller General had collected from it-by offset and deduction from other monies concededly due petitioner. The facts giving rise to the claim

of the United States to collect \$3,520.52 from petitioner by deduction are undisputed.

On or before June 13, 1942, the War Department shipped a Government cargo of lumber, under the standard form Government bill of lading, from Mobile, Alabama, to Port of Spain, Trinidad, on petitioner's SS *Gunvor* (Fng. 10, R. 39). On June 14, 1942, with the Government cargo aboard, the *Gunvor* was lost at sea by enemy action before reaching its destination (Fng. 13, R. 44). A claim for payment of freight on the lost Government cargo, in the amount of \$3,520.52, was subsequently presented by petitioner on the prescribed Government freight voucher (Ex. B, R. 33a), and payment was made by the War Department on or about September 15, 1942 (Fng. 14, R. 44). Upon audit of the account, the Comptroller General took exception to the payment on the ground that the freight had not been earned, and on July 24, 1944, petitioner was advised that a deduction would be made from an amount otherwise due unless the overpayment was refunded within sixty days (Fng. 15, R. 44; Ex. 8, R. 21a-22a). On February 2, 1946, refund not having been made by petitioner, collection was effected by deduction (Fng. 16, R. 45).

The District Court for the Southern District of New York concluded from these facts that petitioner, under the terms of the Government bill of lading, had earned the freight and that the sum of \$3,520.52 was improperly deducted by the

Comptroller General (R. 46-55). On appeal, the Court of Appeals for the Second Circuit (one judge dissenting) reversed, holding that the standard form Government bill of lading "asserted the privilege of any shipper under the admiralty law that it should not pay for what it does not get" (R. 66).

ARGUMENT

1. It is well settled that, absent a valid agreement to the contrary, a carrier does not earn and may not claim payment of freight unless and until it completely performs its contract by delivering the goods to the proper person at the place of destination. See *Caze & Richaud v. Baltimore Ins. Co.*, 7 Cranch 358, 361; *The Tornado*, 108 U. S. 342, 347; Angell, *Carriers*, § 399 (5th ed. 1877); Carver, *Carriage of Goods by Sea*, §§ 543, 547 (8th ed. 1938); Poor, *Charter Parties and Ocean Bills of Lading*, § 108 (3d ed. 1948); Scrutton, *Charter Parties*, Art. 139 (15th ed. 1948); Robinson, *Admiralty*, § 82 (1939).¹ Although this general rule may be varied by express agreement, "such a stipulation should be expressed in terms so clear and unambiguous as to leave no doubt that such was the intention in framing the contract of affreightment."

¹ "Nor," as the court below observes, "is this result unjust to, or hard upon, the petitioner. The law throws upon all carriers the risk of performance, for performance is a condition upon the shipper's promise to pay, just as performance is always a condition upon payment in any contract of service." (R. 66).

Angell, *op. cit. supra*, § 399, note (a); see also *Christie v. Davis Coal & Coke Co.*, 95 Fed. 837, 838-839 (S. D. N. Y.). We submit that petitioner has not demonstrated that the standard form Government bill of lading, which constitutes the basic contract of carriage herein, clearly and unambiguously departs from this long established rule. To the contrary, the Government bill of lading plainly provides for delivery of the cargo at destination before the carrier's right to freight attaches.² Cf. *Pope & Talbot, Inc. v. Guernsey-Westbrook Co.*, 159 F. 2d 139 (C. A. 9); *Toyo Kisen Kaisha v. W. R. Grace & Co.*, 53 F. 2d 740 (C. A. 9), certiorari denied, 273 U. S. 717.

It is petitioner's contention that Clause 6 of the usual commercial ocean bill of lading, which provides that "Full freight to destination * * * are due and payable * * * as soon as the Goods are received for purposes of transportation; and the same * * * shall be deemed fully earned and due and payable * * *. Goods or vessel lost or not lost, * * * and the Carrier shall have a lien on the Goods therefor (whether payable in advance or not and though noted hereon as prepaid); * * *" (R. 43), is incorporated into the Government bill of

² In our view, R. S. 3648 (*supra*, p. 2), the statute prohibiting advance payments, compels this construction of the Government bill of lading. However, the court below found it unnecessary to pass upon the applicability of the statute (R. 67).

lading by Condition 2 of the Government bill, which directs that "Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier." (R. 40).

But the provisions of the Government bill of lading do "otherwise state."³ Condition 1 of the Government bill of lading declares that "Prepayment of charges shall in no case be demanded by carrier, * * *." (R. 39). As Judge Learned Hand points out in the opinion of the court below, even though the words just quoted stood alone, "it would be very unnatural to construe them as applying only to the time of payment of an absolute obligation. We can see no reason why the United States—which drew the bill—should wish to defer the payment of a claim

³ Petitioner argues that the Government bill of lading does not "specifically" override the freight provision of the commercial bill of lading (Pet. 13-14). While we believe that the terms of the Government bill do specifically provide otherwise, it should be pointed out that petitioner misreads Condition 2. The condition is not "unless otherwise specifically provided hereon or otherwise specifically stated hereon" but (1) "unless otherwise specifically provided [elsewhere]" or (2) "otherwise stated hereon." In any event, as already noted, the burden is not upon the Government to show that the standard Government form specifically overrides the commercial form but upon petitioner to show that the Government bill of lading, taken as a whole, clearly and unambiguously modifies the general rule that the carrier does not earn freight until it delivers the cargo at destination.

which it must inevitably pay at some time. It was not, like a private person, in need of any extension of its credit. Why, if the freight was earned upon mere delivery, should it be interested in postponing its collection?" (R. 65-66). But the words do not stand alone; the sentence goes on to say "nor shall collection be made from consignee." The carrier is thereby deprived of its lien for freight, a lien expressly provided for in the freight clause of the usual commercial ocean bill of lading (*supra*, p. 5). Clearly, the denial to the carrier of its lien for freight had nothing to do with the time of payment.

The remainder of Condition 1 bears out and strengthens this interpretation. Continuing, Condition 1 states " * * * On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated." (R. 40).

A "properly accomplished" bill is carefully defined in Instruction 2 of the Government bill of lading (R. 40) which provides in pertinent part that—

* * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evi-

dence upon which settlement for the service will be made. * * *

The certification thus required of the consignee for the "proper accomplishment" of the bill of lading is entitled "Certificate of Delivery" (R. 42) and certifies that—

I have this day received from (name of transportation company) at (actual point of delivery by carrier) the public property described in this bill of lading, in apparent good order and condition, except as noted on the reverse hereof.

The prescribed Government form of freight voucher which must accompany the "properly accomplished" bill of lading when presented for payment provides (Ex. B, R. 33a):

6. Payment for transportation charge will be made only for the quantity of stores delivered at destination * * *.

The express language of these various provisions of the Government bill of lading plainly prohibit the application of Clause 6 of the commercial bill that full freight to destination is due upon receipt of the goods by the carrier. Unless the carrier receives surrender of the bill with the Certificate of Delivery "properly accomplished," it cannot present it to the paying officer with the voucher for payment as required by Condition 1. And there is no ambiguity as to what the parties meant by "properly accomplished"; the consignee is not authorized to surrender the bill of

lading without receiving the goods. Only a bill so receipted^a is a "properly accomplished" bill of lading, the only kind on which the paying officer may pay freight—and then "only for the quantity of stores delivered at destination."^a We submit, therefore, that, under the terms of the Government bill of lading, petitioner did not earn the freight in question and that the sum of \$3,520.52 was properly deducted by the Comptroller General.^a

^a Herein, the consignee's Certificate of Delivery was merely endorsed "S. S. 'Gunvor' has been lost due to enemy action" "For the Acting District Engineer [signature illegible] Superintendent, August 8, 1942" (Ex. 11; R. 28a).

^a Instruction 6 of the Government bill of lading (R. 41) declares that "in case of loss or damage to property while in the possession of the carrier, such loss or damage shall, when practicable, be noted on the bill of lading or certificate in lieu thereof, as the case may be, before its accomplishment. * * *

^a The reliance of petitioner (Pet. 21) and Judge Augustus N. Hand, dissenting below (R. 69-70), on the Comptroller General's decision of April 7, 1942, 21 Comp. Gen. 909, as evidence of a practice to pay unearned freight is misplaced. That decision expressly adhered to the general rule that "delivery of the cargo at the port of destination is a condition precedent to the right to freight" (p. 912) but held (p. 913) that since "the difficulty here is not that these particular shipments were not transported to destination but rather that due to conditions of war prevailing in the Philippine Islands and Guam, it is not possible to establish of record that said shipments were received by the consignee from the carrier at destination. In view of the known conditions in said islands, as commonly reported in public dispatches, any failure to transfer the goods to, or to take receipt from, the consignee upon the discharge of cargo at destination at any time since the early part of December 1941, reasonably may be assumed

2. It appears unlikely that this question will be of any continuing importance. The standard form Government bill of lading, and particularly the language here involved, is currently being extensively revised by the General Accounting Office and other interested Departments. In view of the correctness of the decision below, further review would seem unwarranted.

to be due to the inability of the consignee to receive rather than to any failure of the carrier to deliver, and so would not defeat the right of the carrier to freight charges." The decision thus contemplates merely excusing the carrier from obtaining the certificate and not from carrying the goods to destination. Cf. *McClure v. United States*, 19 C. Cls. 173, 181.

Petitioner's roundabout reliance (Pet. 7) on Sections 16 and 17 of the Shipping Act of 1946 (46 U. S. C. 815-816)—prohibiting "any undue or unreasonable preference or advantage" to a particular shipper—is also obviously unfounded. That statute does not apply where the United States is the shipper, and the Maritime Commission has consistently so construed it. Cf. *United States v. Cooper Corp.*, 312 U. S. 600; 49 U. S. C. 3 (2) and 22 (comparable provisions of the Interstate Commerce Act).

CONCLUSION

The decision below is correct, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should, therefore, be denied.

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SEPTEMBER 1949.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 271

ALCOA STEAMSHIP COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 30-37) is reported at 80 F. Supp. 158. The opinion of the United States Court of Appeals for the Second Circuit (R. 40-46) is reported at 175 F. 2d 661.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1949 (R. 46). The petition for a writ of certiorari was filed on August 16, 1949, and was granted on October 10, 1949.

(R. 53). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether an ocean carrier may compel the United States to pay full freight to destination on Government cargo, shipped under the standard form Government bill of lading, which was lost and never delivered.

STATUTE AND CONTRACT PROVISIONS INVOLVED

The statute prohibiting advance of public money, R. S. 3648, provides in pertinent part as follows:

No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment.

* * *

The standard form Government bill of lading (Form No. 1058, approved August 24, 1928; 8 Comp. Gen. 698) (Ex. 11, R. 72A-72B), standard form Government voucher (Form No. 1068, approved June 26, 1931; 10 Comp. Gen. 588) (Ex. B, R. 74A-74B), and petitioner's commercial form ocean bill of lading (Ex. 10, R. 69-71) are printed in pertinent part, *infra*, pp. ¹⁶⁻²⁵⁻³³ ~~13, 24, 26,~~
~~28-31, 33~~ 34.

STATEMENT

This action was brought by petitioner against the United States for the recovery, under the Tucker Act, now 28 U. S. C. 1346, of \$3,520.52 which the Comptroller General had collected from it by offset and deduction from other monies concededly due petitioner. The facts giving rise to the claim of the United States to collect \$3,520.52 from petitioner by deduction are undisputed.

On or before June 13, 1942, the War Department shipped a Government cargo of lumber, under the standard form Government bill of lading, from Mobile, Alabama, to Port of Spain, Trinidad, on petitioner's S. S. *Gunvor* (R. 25). On June 14, 1942, with the Government cargo aboard, the *Gunvor* was lost at sea by enemy action before reaching its destination (R. 29). A claim for payment of freight on the lost Government cargo, in the amount of \$3,520.52, was subsequently presented by petitioner on the prescribed Government freight voucher (Ex. B, R. 74A-74B), and payment was made by the War Department on or about September 15, 1942 (R. 29). Upon audit of the account, the Comptroller General took exception to the payment on the ground that the freight had not been earned, and on July 24, 1944, petitioner was advised that a deduction would be made from an amount otherwise due unless the overpayment was refunded within sixty days (R. 29; Ex. 8, R. 67-68). On

February 2, 1946, refund not having been made by petitioner, collection was effected by deduction (R. 29).

The District Court for the Southern District of New York concluded from these facts that petitioner, under the terms of the Government bill of lading, had earned the freight and that the sum of \$3,520.52 was improperly deducted by the Comptroller General (R. 30-37). On appeal, the Court of Appeals for the Second Circuit (one judge dissenting) reversed, holding that the standard form Government bill of lading "asserted the privilege of any shipper under the admiralty law that it should not pay for what it does not get" (R. 42).

SUMMARY OF ARGUMENT

This case presents the question whether the United States is liable for payment of ocean freight upon a shipment of Government cargo which was lost and never delivered. The primary problem is one of constructing the standard form Government bill of lading together with petitioner's commercial form bill of lading, in so far as it is incorporated therein by reference, as an entire contract of carriage. A further issue is raised as to whether an agreement to pay freight to destination on Government cargo not delivered to destination is prohibited by R. S. 3648.

It is well settled as a matter of general maritime law that, absent express agreement to the contrary, a carrier does not earn and may not claim payment of freight until it has delivered the cargo to destination. Petitioner's essential contention is that Article 6 of its commercial form bill of lading, which provides that freight shall be due whether or not the cargo is delivered, must be given full effect unless precisely contravened by some specific provision designed to meet and offset it, in the standard form Government bill of lading. As the basis for this approach to the construction of the contract of carriage, petitioner implies that Article 6 of its bill of lading has been uniformly embodied in the usual form commercial bill of lading and has been raised to the status of a general maritime rule. We submit that, in fact, petitioner's assertions as to general maritime law are supported neither by judicial precedent nor, in so far as the issue here concerned is concerned, by commercial practice. A shipper may, as noted by the court below, insist upon full performance of the transportation service as the condition upon which freight will be paid.

Analysis of the standard form Government bill of lading reveals, as the court below held, a "carefully devised plan" whereby payment of

freight is conditioned upon delivery of the cargo to destination. The obligation to pay freight and the transportation service which must be performed in order to give rise to that obligation—a matter as to which the Government's requirement for uniformity is obvious—is completely covered within the four corners of the standard form Government bill of lading. Lack of uniformity among carriers with respect to the creation of an absolute obligation to pay freight, in itself, makes it plain that the Government could not have intended indiscriminately to incorporate by reference into its standard form whatever provision the particular carrier might employ. The clear meaning of the provisions contained in the standard form Government bill of lading and the obvious fiscal policy which supports that plain meaning is backed by more than a century of consistent administrative interpretation and practice.

II

That the construction herein urged by the Government of the standard form Government bill of lading is correct is evidenced by the provisions of R. S. 3648 which, in itself, prohibits the type of contract which petitioner asserts was here executed. That statute provides that “* * * in all cases of contracts for the performance of any service, * * * for the use of the United States, payment shall not exceed

the value of the service rendered * * *.” Petitioner insists, by virtue of Article 6 of its commercial form bill of lading, that “value,” sufficient to support the absolute obligation to pay full freight to destination, has been rendered upon receipt of the cargo at point of shipment. However, this Court and lower federal courts, have upheld such clauses, not on the theory that freight is earned upon receipt of the cargo for shipment but because the shipper has bargained away its right to insist upon complete performance of the contract of carriage. Thus, although there may be consideration which constitutes “value” sufficient, as a matter of contract law, to uphold such a stipulation between commercial shippers and carriers, such consideration is clearly not the “value of the service rendered” to the Government which is contemplated by R. S. 3648.

ARGUMENT

INTRODUCTORY STATEMENT

The question presented in this case is whether the United States becomes obligated, under the standard form Government bill of lading, for the payment of ocean freight upon a shipment of Government cargo as soon as the cargo is received at the port of origin by the carrier. The Government's position is that freight on Government cargo must be earned by delivery to destination and that the United States does not and

cannot lawfully obligate itself to pay freight for a transportation service not performed. Petitioner, on its own behalf and as representative of other ocean carriers (Pet. 12), insists that the Government's obligation to pay freight arises at the port of origin and is absolute without regard to subsequent performance of the contract of carriage by delivery of the cargo to destination. Petitioner charges the Government with this absolute obligation on the basis of the unearned freight clause in its commercial form bill of lading. The position of the respondent is that the provision thus invoked is patently inconsistent with the provisions of the standard form Government bill of lading, unquestionably the controlling document herein, and is necessarily excluded from the contract of carriage thereunder.

The primary problem, then, is one of documentary construction.¹ To reach the result for

¹ The petition for certiorari brought forward a contention that the judgment below was in conflict with the requirements placed upon carrier-shipper relationships by Sections 16 and 17 of the Shipping Act of 1916, 46 U. S. C. 815, 816. This point is not discussed in petitioner's brief on the merits, and we assume that it has been abandoned. The contention was, in any event, entirely without substance. That the Government is fully empowered to avail itself of privileges which may not be open to other shippers is evidenced by the compulsory use of the standard form Government bill of lading. The Maritime Commission, charged with the power and duty of exercising the regulatory authority under the Shipping Act, has never considered that the provisions of that statute are restrictive of relationships between carriers

which it contends, petitioner relies heavily upon assertions as to general commercial practice. Petitioner states that freight earned "lost or not lost" provisions, identical with the provision upon which its case rests, are now in general use in commercial bills of lading (Pet. 13-14), asserting that there is a " * * * well settled commercial practice that freight is earned on shipment * * *" (Pet. Br. 22); and that this " * * * well established or general practice * * * was incorporated into the terms of the carrier's bill of lading * * *" (Pet. Br. 23).

In addition to reliance on this asserted uniform commercial practice, petitioner, and carriers supporting it by briefs *amicus curiae*, also state that a consistent Government administrative practice of long standing supports their position. Petitioner urged, in the court below, that rulings of the Comptroller General fully sustained its views and that such rulings were entitled to substantial weight in interpretation of the contract involved (R. 48). The petition for certiorari and petitioner's brief both refer to rulings and letters of the Comptroller General, and his predecessors, and the Government as shipper. Finally, the terms and conditions involved in transportation of Government cargo do not fall within the area intended to be covered by the Shipping Act of 1916, namely, the control and regulation of practices between commercial shippers and carriers in the field of competition. It should also be noted that the Shipping Act of 1916 does not impose rate regulation on carriers in foreign commerce such as petitioner.

as evidencing a governmental recognition of an obligation to pay unearned freight upon receipt of Government cargo for shipment at port of origin (Pet. 21; Pet. Br. 16-19). Support of the carriers' position herein in a uniform Government practice is more boldly claimed in the briefs *amicus* filed in support of the petition for certiorari. The Waterman Steamship Company states that for " * * * many years the Government has considered that under documents such as here involved it was liable for freight even though the carrier was unable to deliver the cargo * * *" and that " * * * never before has the Government contended that it was on any different footing with respect to liability for freight than any private shipper, * * *" (Waterman Steamship Corporation, Br. in support of petition as *amicus curiae*, 5.) The Stockard Steamship Corporation categorically asserts that the obligation to pay freight upon receipt of the goods by the carrier for shipment accords with the "long settled interpretation by the government of the applicable provisions of the bill of lading * * *" and that the Government's contention herein is a "sudden and belated reversal of position by the government * * *" (Stockard Steamship Corporation Br. in support of petition as *amicus curiae*, 4, 5). Drawing on these assertions as to uniform commercial practice and past governmental policy, it is made to appear that petitioner and other ocean carriers,

acting in good faith during the war, found themselves without protection as to the risk of loss of freight monies as a result of a sudden change in policy by the Government (Pet. 18-19; Pet. Br. 23; Stockard Br. *amicus*, 4).

No part of the picture thus created can survive close scrutiny. First, as we shall show in detail, there is no uniform commercial practice which would lead to the result for which petitioner here contends. The general maritime rule, that freight must be earned by delivery, remains intact and can only be avoided by the use of specific stipulations, designed by ocean carriers for that purpose. Many carriers use stipulations comparable to the provision upon which petitioner relies, making freight absolutely payable whether the payment is prepaid or collect at destination and whether or not any part of the transportation service has been performed. But an equally respectable number of carriers' bills of lading provide only for the retention of *prepaid* freight, whether vessel or goods be "lost or not lost," a provision which obviously could not qualify a carrier as plaintiff in this suit.²

Nor is there justification for the carriers' claim that they were surprised and left without protection by a sudden change in a previously consistent administrative practice. The accusation of un-

² Prepayment of freight is prohibited by the provisions of the standard form Government bill of lading and by R. S. 3648.

fairness leveled at the Government is based on an alleged reliance, apparently reached independently by all water carriers of Government cargo, on two isolated decisions, one in 1918 and the other in 1942, by the Government's accounting officers which fall far short of putting at rest the question here in issue.³ No basis for the alleged reliance exists. For over a hundred years, the consistent administrative practice has been in full accord with the Government's position in this case. This Court may well notice that the shipment of Government property has been a distinct and well understood category of transportation since the beginning of the Republic; and that the terms and conditions which control such carriage, and the presentation and settlement of claims thereunder, form a familiar and continuous item in the business of every carrier. In fact, the absence of the asserted reliance is shown by the fact, noted by Judge Learned Hand in the court below (R. 41), that the petitioner made specific inquiry of the Comptroller General

³ The decision of the Comptroller General of the Treasury upon which petitioner mainly relies, 24 Comp. Dec. 707, was issued in 1918. Even if this decision supported petitioner's position herein, it can hardly be viewed as controlling on the point here involved in the light of other decisions of the Comptroller General. Cf. Appendix B, separately printed. The second decision relied upon to illustrate a continuous administrative practice which misled petitioner is that found in 21 Comp. Gen. 909, an opinion rendered on April 7, 1942. It can hardly be assumed that this opinion was available to petitioner as a basis for action in connection with the ship-

on the point in issue, more than a year before the loss here involved occurred. The Comptroller's reply clearly put petitioner on notice that no such reliance as that here asserted was warranted. See Appendix B, p. 136.⁴

We submit that a construction of the pertinent language of the documents involved in this case, even without reference to the background of the phrasing employed, clearly shows that freight to destination is not earned by a carrier until the contract of carriage is performed by delivery of the shipment to destination. Reading the documents in the light of their background, there can be no doubt that the result reached by the court below was correct. Finally, we submit that the result below must be deemed compelled by the provisions of R. S. 3648.

**THE STANDARD FORM GOVERNMENT BILL OF LADING
PRECLUDES THE PAYMENT OF UNEARNED FREIGHT
TO OCEAN CARRIERS**

The issue of construction presented by this case centers on the reading of the standard form Government bill of lading together with petitioner's commercial bill of lading, in so far as it is incorporated therein by reference, as an

instrument in this case. In point of fact, neither decision supports the position of the petitioners. See *infra*, pp. ~~17-18~~, ~~27-28~~, 32-39.

⁴ Appendix B hereto is printed under separate cover.

entire contract of carriage. Concededly, petitioner's commercial form bill of lading contains a provision which purports to entitle it to retain or recover freight, whether prepaid or collect at destination, although the transportation service is not performed. Essentially, petitioner's position is that this clause must be given full effect unless precisely contravened by some specific provision, designed to meet and offset it, in the standard form Government bill of lading. As the basis for this approach to the construction of the contract of carriage, petitioner asserts that there is a " * * * well established or general practice" that freight be deemed earned on shipment, vessel or goods lost or not lost, which has been uniformly embodied in the usual form commercial bill of lading (Pet. Br. 23). And see also Briefs as *amicus curiae*, Waterman Steamship Corporation, pp. 4, 5; Stockard Steamship Corporation, pp. 2, 3, 4, 5. In effect, petitioner seeks to raise the stipulation contained in its commercial form bill of lading to the dignity of a "legal rule" (Pet. Br. 19) and thus to throw on the Government the burden of showing an express agreement controverting this "legal rule." We submit that the approach suggested by petitioner is incorrect and without basis in general maritime law.

Unquestionably, the standard form Government bill of lading is the controlling document herein. All shipments of Government property

are required to be made subject to the provisions of the standard form bill which defines and limits the obligations of the Government under the contract of carriage.⁵ For obvious consider-

⁵ By General Regulations prescribed and published by the Comptroller General, and his predecessors, all shipments of Government property are made subject to the provisions of a set of standard forms. In part, this set comprises a bill of lading, memorandum bill of lading, shipping order, and voucher. See Treasury Department Circular No. 62, October 29, 1907, 14 Comp. Dec. 967; Treasury Department Circular No. 49, June 19, 1915, Digest of Comp. Dec. (1894-1920), p. 2489; General Regulations No. 69 of the Comptroller General, August 24, 1928, 8 Comp. Gen. 625; General Regulations No. 75 of the Comptroller General, June 26, 1931, 10 Comp. Gen. 581; General Regulations No. 97 of the Comptroller General, April 13, 1943, 22 Comp. Gen. 1172. The bill of lading set consists of the original bill of lading, containing the description of the articles comprising the shipment, evidence of delivery, and the terms and conditions of the contract of transportation, together with the memorandum copy or copies, to be retained for administrative purposes, and the shipping order, to be retained by the carrier. When the bill of lading forms have been completed by the consignor, the property listed therein consigned to the carrier for shipment, and the original bill received by the agent of the carrier, the consignor then transmits the original bill to the consignee, so that it may be in his possession upon arrival of the property and be promptly receipted and surrendered by him to the last carrier. When the shipping order has been otherwise completed, it is signed by the consignor and delivered to the initial carrier at the time the shipment is made and the bill of lading receipted by the initial carrier's agent. As provided in Condition 1 of the bill of lading, payment for transportation is made to the carrier upon the standard form voucher, accompanied by the bill of lading properly accomplished. If the bill of lading has been lost or destroyed, payment is made upon submission of a standard form Certificate in lieu of lost bill of lading.

ations of convenience, however, provision is made for the incorporation by reference into the Government form of such provisions of carriers' forms as are not inconsistent with the provisions of the Government form.* Cf. *M. K. T. & R. R. Co. v. United States*, 62 C. Cls. 373, certiorari denied, 273 U. S. 725. Carriers' bills reflect and incorporate many details based on the needs of particular trades and voyages. The incorporation of these many and varied factors, embodied in clauses which reflect the physical operating experience of carriers, provides the Government with a ready method of rounding out the details of its contract of carriage. In addition, clauses protecting the carrier against cargo liability for marine peril, the restraint of princes, etc., are brought into the contract.

In sharp contrast to the incorporation of such features is the carrier's contention in this case as to the controlling nature of its commercial form clause. First, the one thing specifically covered within the four corners of the Government standard form bill is the subject of payment and the conditions on which payment will be made. These provisions do not relate merely to methods or time of payment. Examined specifically, the

* Condition 2 states: "Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments on the usual forms provided therefor by the carrier" (R. 72B).

Government standard form bill, makes it perfectly plain that payment is completely conditioned on proof of performance. Any provision in a carrier's commercial form bill of lading which would vary the basic consideration on which payment will be made by the Government is necessarily inconsistent with the standard form bill, the basic document in the contract of carriage. (See Point I-B, *infra*, pp. 24-31.)

Secondly, petitioner's allegations concerning general maritime law and the incidence in commercial bills of lading of the freight clause employed in petitioner's bill are completely erroneous and misleading and afford no basis for construing the contract of carriage as including petitioner's freight clause. Since petitioner's case is bottomed upon these erroneous allegations as to general maritime law and usage, it is necessary, prior to a detailed examination of the contract, to state correctly the general maritime law which would be applicable in the absence of express agreement between the parties.

A. THE GENERAL MARITIME RULE, THAT FREIGHT MUST BE EARNED BY PERFORMANCE, CONTROLS THE SHIPPER'S OBLIGATION TO PAY FREIGHT UNLESS AVOIDED BY EXPRESS STIPULATION

In both England and this country, it has long been well settled that, absent agreement to the contrary, the carrier does not earn and may not claim payment of freight until it has delivered the

goods to destination.' *Brittan v. Barnaby*, 21 How. 527, 533; *Caze & Richaud v. Baltimore Ins. Co.*, 7 Cranch 358; *The Cuba*, 6 Fed. Cas. No. 3458 (D. Me.); *Dakin v. Oxley* [1864], 33 L. J., C. P. 115, 119; *Asfar & Co. v. Blundell* [1896], 1 Q. B. 123; Angell, *Carriers*, § 399 (5th ed. 1877); Scruton, *Charter Parties*, Art. 139 (15th ed. 1948); Robinson, *Admiralty*, § 82 (1939). "Nor," as the court below observes, "is this result unjust to, or

⁷ Of course, the rule has always been that freight is earned if the carrier is ready to deliver but the consignee is unable or unwilling to receive. In *The Nathaniel Hooper*, 17 Fed. Cas. 1185, 1190 (C. C. D. Mass.), 3 Sumn. 542, 555, the Court said: "The whole of the cases, in which the full freight is upon the ordinary principles of commercial law due, notwithstanding the non-arrival of the goods at the port of destination, may be reduced to the single statement, that the non-arrival has been occasioned by no default or inability of the carrier ship, but has been occasioned by the default or waiver of the merchant-shipper." See *Clen-daniel v. Tuckerman*, 17 Barb. (N. Y.) 184, where carrier was ready to deliver cargo but consignee was not ready to receive it and while waiting to discharge cargo the vessel was capsized by a freshet and the cargo lost. *Held*, freight earned. See *Cargo ex Argos* [1873], L. R. 5 P. C. 134; Poor, *Charter Parties and Ocean Bills of Lading*, § 108 (3d ed. 1948).

The Comptroller General's decision of 1942, 21 Comp. Gen. 909, upon which the petitioner relies (Pet. Br. 17), is consistent with this principle, but it is certainly no authority for the proposition that the Government, as a shipper, is liable for freight on cargo which the carrier was never ready to deliver. The narrow decision in that opinion was that substitute evidence could be furnished by a carrier to show that the contract of carriage had been completed to port of desti-

hard upon, the petitioner [carrier]. The law throws upon all carriers the risk of performance, for performance is a condition upon the shipper's promise to pay, just as performance is always a condition upon payment in any contract of service." (R. 42.) In *The Ann D. Richardson*, 1 Fed. Cas. No. 410 (S. D. N. Y.), the court stated the basis for the general rule (p. 953): "The delivery of the cargo at the port of destination is considered a condition precedent to the right to freight * * *." See *The Norman Prince*,

nation but that conditions at that point prevented the carrier from obtaining the necessary receipts upon delivery. In so far as the issue here is concerned, we submit that the Comptroller General's decision of 1942 fully supports the Government's position. That decision expressly adhered to the general rule that "delivery of the cargo at the port of destination is a condition precedent to the right to freight" (p. 912), but held (p. 913) that "the difficulty here is not that these particular shipments were not transported to destination but rather that due to conditions of war prevailing in the Philippine Islands and Guam, it is not possible to establish of record that said shipments were received by the consignee from the carrier at destination. In view of the known conditions in said islands, as commonly reported in public dispatches, any failure to transfer the goods to, or to take receipt from, the consignee upon the discharge of cargo at destination at any time since the early part of December 1941, reasonably may be assumed to be due to the inability of the consignee to receive rather than to any failure of the carrier to deliver, and so would not defeat the right of the carrier to freight charges." The decision thus contemplates merely excusing the carrier from obtaining the certificate and not from carrying the goods to destination. Cf. *McClure v. United States*, 19 C. Cls. 173, 181.

185 Fed. 169, 171 (S. D. Ala.). This general rule of the law merchant may be varied by express agreement, sufficiently clear as to leave no doubt with regard to the intention of the parties in framing the contract of affreightment. *Brittan v. Barnaby*, 21 How. at 536; *Christie v. Davis Coal & Coke Co.*, 95 Fed. 835, 839 (S. D. N. Y.); *The Norman Prince*, *supra*; *London Transport Co. v. Trechmann Brothers* [1904], 1 K. B. 635; Angell, *Carriers*, § 399, note (a); *Benner v. Equitable Safety Ins. Co.*, 6 Allen (Mass.) 222, 224; *Norton-Crossing Co. v. Martin*, 202 Ala. 569, 81 So. 71. Where such an express agreement is made, it does not work any change in the basic concept as to the earning of freight. Freight, strictly speaking, can only be payment for the conveyance of cargo to destination. *Poland v. The Spartan*, 19 Fed. Cas. No. 11246 (D. Me.); see *Brittan v. Barnaby*, 21 How. 527, 533; Smith, *Mercantile Law*, p. 391 (3d ed. 1855); Angell, *Carriers*, § 399 (5th ed. 1877). Carriers' stipulations in avoidance of the general rule are enforced only as bargains between the parties and without relation to performance of the transportation service. *Portland Flouring Mills Co. v. British & Foreign Marine Ins. Co.*, 130 Fed. 860, 864 (C. A. 9), certiorari denied, 195 U. S. 629; *The Queensmore*, 53 Fed. 1022 (C. A. 4); *James Richardson & Sons*

v. 158,200 Bushels of Wheat, 90 F. 2d 607 (C. A. 2).*

The current vitality of this basic rule is demonstrated by a recent decision of the Court of Appeals for the Second Circuit which held that, in the absence of an express stipulation, a carrier could lay no claim to freight when it had not performed the contract of carriage. *The Motor-mar*, 108 F. 2d 755 (C. A. 2), affirming 29 F. Supp. 210 (S. D. N. Y.). Thus, contrary to petitioner's insinuations, the widespread use of such stipulations has effected no change in the underlying law.

In point of fact, carriers' stipulations concerning the obligation to pay freight when cargo is not delivered do not display the uniformity which petitioner assumes. Such stipulations may be

* In *The Gracie D. Chambers*, 253 Fed. 182, 184 (C. A. 2), the court said:

The District Judge thought that if the ship had broken ground—e. g., if she had sailed a mile—the prepaid freight [with a "ship lost or not lost" provision] might be retained. Clearly it could not be retained for that reason, because under our law it is not earned until delivery of the cargo. Only the clause in the bill of lading could authorize the retention.

This was specifically affirmed by this Court at 248 U. S. 387, 392. It and *Allanwilde Transport Corp. v. Vacuum Oil Co.*, 248 U. S. 337, stand for the proposition that agreements as to retention of freight contrary to the general rule will be enforced, even though in actuality the freight has not been earned. See *Benner v. Equitable Safety Ins. Co.*, 6 Allen (Mass.) 222, 224.

divided into two main types. The first type, and by far the older, guarantees to an ocean carrier the right to retain *prepaid* freight, vessel or goods lost or not lost.⁹ It is this type of unearned freight stipulation which has received the greatest amount of judicial scrutiny. See, e. g., *Allanwilde Transport Corp. v. Vacuum Oil Co.*, 248 U. S. 377; *International Paper Co. v. The Gracie D. Chambers*, 248 U. S. 387; *Standard Varnish Works v. The Bris*, 248 U. S. 392.¹⁰ The second type, comparable to that of the petitioner's bill of lading, gives to the carrier an absolute right to freight at some point at the outset of the venture, whether freight be prepaid or

⁹ Historically, the length and difficulty of voyages, the lack of a carrier's agent at port of destination, and other comparable factors, gave rise to a practice among carriers of bargaining with shippers for prepaid freight. By English law, such prepaid freight could not be recovered by the shipper where the ship, through no fault on its own part, had been prevented from completing the voyage (*Byrne v. Schiller*, [1871] L. R., 6 Ex. 319; *Allison v. Briston Marine Ins. Co.*, [1876] 1 App. Cas. 209), a rule apparently intended as an inducement to shipowners to undertake the perilous run to India. See Robinson, *Admiralty*, § 82 (1939). The American rule is squarely to the contrary. Prepaid freight, in the absence of special agreement, is required to be refunded to the shipper if the goods were not carried and delivered. *The Kimball*, 3 Wall. 37, 44; *Griggs v. Austin*, 3 Pick. (Mass.) 20; *De Sola v. Pomares*, 119 Fed. 373 (S. D. N. Y.); Poor, *Charter Parties and Ocean Bills of Lading*, § 109 (3d ed. 1948).

¹⁰ In all of these cases, the question certified to this Court by the Court of Appeals for the Second Circuit related only to the carrier's right to retain or recover prepaid freight.

collect at destination. Petitioner insists, without mention of the above described variations, that the clause contained in its bill of lading represents a long established and uniform practice among ocean carriers. Such has not been and is not the case. An examination of certified bills of lading on file with the Division of Regulation, United States Maritime Commission, reveals that a large number of ocean carriers still limit their unearned freight clause to the prepaid freight situation; and that a number of the carriers' bills of lading, which are now like the petitioner's, were amended in 1936 and later to remove the limitation." In view of the obvious need for uniformity in determining the nature of the basic service (*i. e.*, whether delivery of cargo at destination or mere acceptance of cargo at port of origin) for which the Government's standard form bill of lading is intended to obligate the Government to pay, this variation in commercial practice seriously weakens the petitioner's contention that the Government's standard form is intended to incorporate by reference

45-48

" See Appendix A, *infra*, pp. ~~44-45~~. The certified bills of lading examined include those contemporary with that used by petitioner. Significantly, a member of petitioner's own shipping conference of three carriers (Leeward & Windward Islands Conference), the Bermuda & West Indies Steamship Co., Ltd. (R. 60), employed, at the time in question, only the prepaid freight clause. (The Bermuda & West Indies Steamship Co. is listed in Appendix A as Furness West Indies Line.)

the carrier's unearned freight clause, whatever it may be.¹² And see *infra*, pp. 34-35.

B. THE STANDARD FORM BILL OF LADING SPECIFICALLY CONDITIONED PETITIONER'S RIGHT TO FREIGHT UPON DELIVERY OF THE CARGO TO DESTINATION

1. From the foregoing paragraphs, it is apparent that the Government cannot be liable for freight in the instant situation unless it has expressly so stipulated. But no such stipulation can be read into the Government's standard form bill of lading, which embodies the agree-

¹² Moreover, even if the petitioner's assertions as to uniform practice among ocean carriers were more accurate than they are, and if this "uniform practice" could be supposed to have changed the established rule of admiralty, it would still be necessary to point out that generalizations based on commercial practice are not always helpful where the construction of government forms is concerned. The situation of the Government differs in a number of significant respects from that of private commercial shippers. Thus, as Judge Learned Hand pointed out in the court below (R. 43), a probable reason for the prevalence of the clause which reverses the rule of admiralty and throws the risk upon the shipper is simply the carrier's superior bargaining position. But, *vis a-vis* the Government, the carriers could normally exercise no such compulsion, for the bargaining position of the Government is obviously much stronger than that of any private shipper. Again, Judge Hand pointed out, the commercial shippers may accept the carriers' terms because, in their case, the burden is distributed by insurance; but the United States must be a self-insurer in the absence of express statutory authority. In short, the considerations upon which the petitioner predicates its implication that the rule of *Brittan v. Barnaby*, 21 How. 527, *supra*, is no longer law, have but little application to situations in which the Government is the shipper.

ment between the parties. That the Government bill of lading, on the contrary, constitutes a "carefully devised plan" whereby payment of freight is conditioned on performance of the contract of carriage and the submission of proof of such performance as pointed out by the court below (R. 42) is clearly established by the steps which it requires the carrier to take in order to obtain payment. Condition 1 of the Government standard form provides (R. 72B):

Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier unless otherwise specifically stipulated.

Thus, payment is made by the Government, not through its agents or employees acting as shippers or consignees, but only through the usual channels by which all payments for services to the Government are made, designated disbursing officers. Payment by such officers is conditioned on the presentation of a bill of lading, "properly accomplished," together with a freight voucher on the authorized form.¹³ Until

¹³ Since payment of Government freight is conditioned on the presentation of a properly executed standard form freight voucher as well as an accomplished bill of lading,

such presentation, no obligation to pay can arise. This condition precedent is evidenced by the carefully integrated provisions of both standard forms.¹⁴

Instruction 2⁸ of the Government standard form bill of lading (R. 72B) provides that—

* * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading

there is obviously no merit to petitioner's suggestion that the terms on which the Government agrees to pay freight should be decided without reference to the freight voucher (Pet. Br. 25). This Court might well take notice that such freight vouchers are fully as familiar to carriers as is the standard form Government bill of lading and that carriers contract with reference to the execution of all documents necessary to receive payment for the performance of transportation service, particularly since they are specifically notified at the outset, by Condition 1 of the standard form bill of lading, that the freight voucher forms a necessary ingredient in the proof upon which payment will be based.

¹⁴ In its brief *amicus curiae* (p. 7), the Waterman Steamship Corporation asserts that the only pertinent clauses of the standard form bill are those labeled "Conditions" and that clauses labeled "Instructions" and "Administrative Directions" form no part of the contract of carriage. Waterman thereby overlooks Condition 2 of the standard form which incorporates into the contract the provisions of the carrier's usual bill "unless otherwise specifically provided or otherwise stated hereon." The plain import of that condition is to make all the language contained on the reverse of the standard form a part of the contract of carriage. Unless it be thought that Condition 2 is redundant in employing the phraseology "otherwise provided or otherwise stated," it is clear that reference is had by "otherwise provided" to the Conditions and by "otherwise stated" to the Instructions and Administrative Directions.

and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. * * *

The certification required of the consignee for the "proper accomplishment" of the bill of lading is entitled "Certificate of Delivery" (R. 72A) and certifies that—

I have this day received from (name of transportation company) at (actual point of delivery by carrier) the public property described in this bill of lading, in apparent good order and condition, except as noted on the reverse hereof.

In accordance with Condition 1, the "properly accomplished" bill of lading, when presented for payment, must be accompanied by the prescribed standard form Government freight voucher. This voucher provides (R. 74B):

6. Payment for transportation charge will be made only for the quantity of stores delivered at destination * * *.

These instructions demonstrate that there is no ambiguity as to what is meant by "properly accomplished"; ¹⁵ the consignee is not authorized to

¹⁵ Petitioner's reference (Pet. Br. 13-14) to the meaning of the word "accomplished," in connection with bills of lading in common maritime usage, is without relevance here. The problem here is whether the standard form bill of lading has been "properly" accomplished. "Proper" accomplishment can only result from satisfaction of the various steps and conditions required in the standard form documents set out above.

endorse and surrender the bill of lading without receiving the goods. Only a bill so receipted¹⁶ is a "properly accomplished" bill of lading, the only kind on which the paying officer may pay freight—and then "only for the quantity of stores delivered at destination." We submit that it is completely clear, from the procedure specifically set out in the standard form Government bill of lading and freight voucher, that the Government undertakes to pay freight only for completed transportation service and that the Government standard contract for such service specifically so provides.

Bearing out and strengthening this interpretation are the provisions of Instructions 4 and 5 of the standard form bill, relating to lost or destroyed bills of lading. Instruction 4 (R. 72B) states that—

* * * In case the bill of lading has been lost or destroyed, the carrier shall be furnished by the consignee with a "Certificate in lieu of lost bill of lading," on the standard form prescribed therefor [Standard Form No. 1061, August 24, 1928, 8 Comp. Gen. 703] which, when finally consummated by acknowledgment

¹⁶ Herein the consignee's Certificate of Delivery was merely endorsed "S. S. GUNVOR has been lost due to enemy action" "For the Acting District Engineer [signature illegible] Superintendent, August 8, 1942" (Ex. 11; R. 72A). Such an endorsement is intended for the subsequent use, as in this case, of the disbursing and accounting officers of the Government (R. 65).

of the "Certificate and waiver by transportation company," shall accompany the bill for services submitted by the carrier * * *

Like the standard form bill of lading, the Certificate in lieu of lost bill of lading bears on its face a Certificate of Consignee which must be "properly accomplished" prior to presentation with the standard form voucher for payment (Condition 1 of Standard Form No. 1061). Proper accomplishment is had when the consignee affirms that (8 Comp. Gen. 703)—

I hereby certify to the receipt of the above-described property, except as noted on the reverse hereof, and that the original bill of lading indicated has not been received, nor can it be located.

The procedure to be followed in the event of a lost bill of lading is further amplified in Instruction 5 of the standard form bill (R. 72B), which provides that—

To insure prompt delivery of property, in the absence of a bill of lading, the consignee should give to the carrier a "Temporary Receipt," executed on the prescribed form [Standard Form No. 1060, August 24, 1928, 8 Comp. Gen. 703] *for the property actually delivered*. On the recovery of the bill of lading, or when the certificate provided for above shall have been given, a statement will be indorsed on said bill of lading or certificate of the fact of the

delivery *as per said temporary receipt*
 * * * and both papers attached and
 forwarded with the claim for payment
 thereon. [Emphasis added.]

The duties of the consignee and the rights of the carrier are thus plainly defined. As in the case where the bill of lading is not lost or destroyed, the consignee is to acknowledge receipt only of the goods actually received. When so receipted and attached to the standard form voucher, payment is then made "only for the quantity of stores delivered at destination."

Thus, each and every provision of the standard forms specifically conditions the right to freight upon delivery of the cargo to destination. In other words, the Government undertakes to pay freight only for cargo actually delivered to destination. Where, as here, no cargo is thus delivered, no obligation to pay freight arises. The complete interdependence between performance of service and obligation to pay is further demonstrated by those provisions of the standard form bill which define the Government's obligation to pay freight on cargo which is partially lost or delivered in a damaged condition. In cases of short delivery, freight is paid only up to the extent of the transportation service rendered. 4 Comp. Gen. 562; 3 Comp. Dec. 221; 4 Comp. Dec. 544. Instruction 6 of the standard form bill of lading provides (R. 72B):

In case of loss or damage to property while in the possession of the carrier, such loss or damage shall, when practicable, be noted on the bill of lading or certificate in lieu thereof, as the case may be, before its accomplishment. All practicable steps shall be taken at that time to determine the loss or damage and the liability therefor and to collect and transmit to the proper officer, without delay, all evidence as to the same. Should the loss or damage not be discovered until after the bill of lading or certificate has been accomplished, the proper officer shall be notified as soon as the loss or damage is discovered, and the agent of the carrier advised immediately of such loss or damage extending privilege of examination of shipment.¹⁷

The prescribed report of loss, damage or shrink-

¹⁷ Instruction 6 is but a lost or damaged deficiency provision, and serves a two-fold purpose. It is inserted with a view to the established right of the shipper to deduct from the freight charges damage to the cargo due to the negligence of the carrier. See *The Water Witch*, 1 Black 494; *The Rita Sister*, 69 F. Supp. 480 (E. D. Pa.); *Clifford v. Merritt-Chapman & Scott Corp.*, 57 F. 2d 1021, 1024 (C. A. 5). Secondly, it recognizes and incorporates the doctrine of part payment whereby, in spite of the fact that a portion of the cargo has been lost, the carrier is entitled to freight on the goods actually delivered. See *Edward Hines Lumber Co. v. Chamberlain*, 118 Fed. 716 (C. A. 7); *Gibson v. Brown*, 44 Fed. 98 (S. D. N. Y.); *Price v. Hartshorn*, 44 N. Y. 94. Clearly such a provision does not envisage payment of full freight in spite of partial delivery but "shows that freight was to be allowed on that which was received." *Price v. Hartshorn*, *supra*, at 101.

age set forth on the reverse of the standard form bill of lading (R. 72B), notifies the carrier that the "shipment was received in condition shown below and that claim is made for the value of such loss, damage, or shrinkage, as indicated." After accomplishment, the standard form bill is attached to the standard form voucher which declares that (R. 74B)—

6. Payment for transportation charge will be made only for the quantity of stores delivered at destination. * * *. Loss or damage for which a carrier is responsible will be deducted in making settlements for the services.

The standard form bill and voucher, thus read together, plainly embody the Government policy that freight will be paid only for transportation services actually rendered.¹⁸

¹⁸ The dissenting opinion below of Judge Augustus Hand, in holding that Condition 1 and Instruction 2 of the standard form bill are not inconsistent with the provision of Article 6 of the petitioner's commercial form bill of lading that freight shall be due even though cargo be lost, is grounded mainly upon an erroneous reading of Instruction 6. The opinion states "Nor do I see that the provisions of Condition 1 or Instruction 2 control the case at bar. * * * Condition 1 and Instruction 2 relate only to the mode of settlement when the freight has been delivered. Instruction 6 apparently deals with a case where there has been partial delivery, and seems to involve the assumption that there may be instances where there is a partial loss for which freight charges may be collected under the terms of the commercial bill of lading. Instruction 6 does no more than require a notation of such a partial loss on the government bill of lading and contains nothing to indicate that such partial loss would prevent the

Under the terms of the Government's standard form (Condition 2) the provisions of a carrier's commercial form are applicable only in so far as not "otherwise specifically provided or otherwise stated" in the Government form. The foregoing paragraphs make it plain that Article 6 of the petitioner's commercial form provision entitling it to freight even though it has lost the cargo which was to be delivered, cannot be reconciled with the "carefully devised plan" of the Government form of contract and so cannot form a part of that contract. As we have demonstrated, the above described provisions of the Government bill of lading specifically exclude the incorporation of any provision that freight might be earned other than by performance of the transportation service.

Moreover, we believe that the first sentence of Condition 1 of the standard form Government bill in itself specifically prohibits the applicability of petitioner's Article 6, particularly if the provision in petitioner's bill be read with the same literalness which petitioner advocates in connection with the Government standard form.¹⁹

bill of lading from being 'properly accomplished.' " (R. 44.) Since the standard form voucher specifically provides, in accordance with long established Government practice, that a proportional reduction of freight is made for short delivery, it is apparent that Judge Hand's assumption as to the meaning of Instruction 6 is incorrect.

¹⁹ A close reading of petitioner's Article 6 is warranted by the rules in decided cases, *supra*, p. 19., that stipulations in

Since 1915, Condition 1 of the Government standard form has specifically prohibited both prepayment and payment by consignee at destination. Article 6 of petitioner's commercial form, making freight due and payable though unearned, applies in terms only to shipments on which freight is either prepaid or payable by consignee at destination. No provision is made therein for any other type of shipment.²⁰

Since there can be no payment of freight on Government shipments either at point of origin or by the consignee, petitioner's stipulation as to unearned freight fails to avoid its general maritime law obligation in connection with Government cargo.

2. The inappropriateness of the language of petitioner's Article 6 in connection with Government shipments evidences its basic inappositeness for use in connection with Government form con-avoidance of the shipowner's obligation to perform in order to earn freight, must be precise to be given effect.

²⁰ Article 6 provides in pertinent part that—

Full freight to destination, whether intended to be prepaid or collected at destination, * * * are due and payable * * * as soon as the Goods are received for purposes of transportation; and the same * * * shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading, of the service hereunder without deduction (if unpaid) or refund in whole or in part (if paid). Goods or Vessel lost or not lost, or if the voyage be broken up; * * * and the Carrier shall have a lien on the Goods therefor * * * . Full freight shall be payable on damaged and unsound goods. * * * (R. 69-70.)

tracts of carriage.²¹ Petitioner's unearned freight clause arose from and is designed to meet the relationship between commercial shippers and carriers. And the justification which petitioner offers in support of the clause consists entirely of economic considerations which have little or no application to the Government (Pet. Br. 25). And see fn. 12, *supra*, p. 28. On the other hand, it is clear that, if there is any matter on which a standard form Government bill of lading ought to receive uniform interpretation, it is on the nature of the service which a carrier must perform in order to qualify for payment. At the present time, petitioner's contention, that the Government is obligated to pay for a service not performed by virtue of its unearned freight clause, would result in complete lack of uniformity. Carriers performing services for the Government comparable to that of petitioner, who employ only the "prepaid" form of unearned freight clause, would entirely lack standing as claimants for unearned freight, since freight on

²¹ Apparently recognizing the conflict between the Government standard form and the commercial form bill of lading with regard to the issue herein, Waterman goes so far as to suggest that the Government form is a mere "makeshift" and the Government in reality has no proper form for ocean transportation, *i. e.*, one which would give adequate recognition to carriers' peculiar customs including, of course, the right to unearned freight (Waterman, brief *amicus*, 8). Waterman does admit that the Government standard form is and always has been required for ocean shipments of Government cargo (Waterman, brief *amicus*, 4).

Government shipments can never be prepaid. As we have shown above, there are a respectable number of such carriers. Moreover, if petitioner's contention be accepted, it would logically follow that the nature of the Government's obligation to pay could be varied, at will, by the carriers. We submit that it cannot be supposed that the standard form Government bill of lading was intended to leave the most basic question of the contract of carriage, the nature of the service for which payment was to be made, to the incorporation by reference into the standard form of an easily changeable provision in carriers' commercial form bills of lading.

3. Petitioner, and carriers supporting it by briefs *amicus curiae*, assert that a consistent Government administrative practice of long standing supports their position. Petitioner urged, in the court below, that Comptroller General rulings fully sustained its views and that such rulings were entitled to substantial weight in the interpretation of the contract of carriage. (R. 48). The petition for certiorari and the petitioner's brief both refer to rulings and letters of the Comptroller General, and his predecessors, as evidencing a governmental recognition of an obligation to pay unearned freight upon receipt of Government cargo for shipment at point of origin (Pet. 21; Pet. Br. 16-19). The Waterman Steamship Company states that for " * * * many years the Government has considered that under

documents such as here involved it was liable for freight even though the carrier was unable to deliver the cargo * * * and that " * * * never before has the Government contended that it was on any different footing with respect to liability for freight than any private shipper * * *." Waterman Steamship Corporation, Br. in support of Petition as *amicus curiae*, 5. Similar statements are made in the brief as *amicus curiae*, p. 4. The Stockard Steamship Corporation categorically asserts that the obligation to pay freight upon receipt of the goods by the carrier for shipment accords with the " * * * long-settled interpretation by the government of the applicable provisions of the bill of lading," that "The government thus adopted and acted upon over a period of many years an interpretation directly opposed to that for which it now contends," and that accordingly "The harsh results to the steamship companies when they contracted in reliance on the accepted interpretation impose on the government a heavy burden of proof to justify its sudden and belated reversal of position." Stockard Steamship Corporation, Brief as *amicus curiae*, 3, 4.

These statements are simply untrue. At our request, the Comptroller General's office has made as careful a study as was possible in the time available. A report on that study with supporting references and attachments is attached hereto

as Appendix B.²² Such report, a fair and careful statement with regard to interpretation and application of the Government standard form bill of lading in relation to the issue here raised, demonstrates a consistent administrative practice in support of the position which the Government urges herein. Moreover, the report demonstrates that there is no basis whatsoever for the contention by petitioner and its sup-

²² Particular mention should be made here of the decision of the Comptroller of the Treasury reported in 24 Comp. Dec. 707. The heavy reliance which petitioner, and the carriers supporting petitioner, place upon the opinion is in no way justified. The contract of carriage there involved was not the Government standard form contract. The Government form bills of lading which covered the freight charges there involved had been changed so as to relieve the carrier of any responsibility for condition or contents of cargo on delivery and further specifically provided that freight was to be prepaid. Stamped on the Government form was "Not responsible for condition or contents on delivery" and "freight prepaid." The special contract thus formed was controlling as to the intent of the parties. Cf. *Toyo Kisen Kaisha v. W. R. Grace & Co.*, 53 F. 2d 740 (C. A. 9), certiorari denied, 273 U. S. 717.

This deviation from the Government's normal practice may be accounted for by the fact that the carriage concerned in 24 Comp. Dec. 707 was performed by a vessel operated for the United States Shipping Board Emergency Fleet Corporation. While, in 1918, caution was exercised in dealing with certain aspects of the function of the corporate entity created by the Government to handle World War I shipping, there is no doubt that the Fleet Corporation was a governmental agency. Compare *United States ex rel. Skinner & Eddy Corp. v. McCarl*, 275 U. S. 1, with *Emergency Fleet Corp. v. Western Union*, 275 U. S. 415. Accordingly, the opinion in 24 Comp. Dec. 707 was concerned with freight

porters herein that they were caught by surprise and unprotected by a sudden change in the Government's policy and position. On the contrary, the report indicates, what might have been expected, the carriers' complete familiarity with the terms and conditions of Government transportation under standard form bills and a more or less continuous effort to work a change in the Government's position.

II

R. S. 3648 CLEARLY PROHIBITS THE PAYMENT OF UNEARNED FREIGHT BY THE GOVERNMENT

As a simple matter of contract interpretation, petitioner's claim fails. In addition, and apart from the question of contractual intent,²³ it is

earnings by the Government as a carrier, and interdepartmental accounting. Similarly, in World War II, the Government became, of necessity, the principal carrier. In connection with this function, the Comptroller General authorized, in May 1944, the use by the War Shipping Administration of a special form of bill of lading, the "War Shiplading," for use by the Government in the transportation of its own property. Payment to the War Shipping Administration by other Government departments under the "War Shiplading" was again merely a matter of intergovernmental accounting. Petitioner's unexplained quotations (Pet. Br. 18) from the Comptroller General's authorization of May 11, 1944, to the War Shipping Administration, are taken out of context and are misleading. See Appendix B, p. 185.

²³ We do not mean to infer that the standard form Government bill of lading does not reflect the legislative mandate of R. S. 3648. Recognition of this appears throughout the rulings of the Government's officers. See Appendix B, pp. 7, 9, 11, 13-14, 18, 26-28.

plain that petitioner's claim in this suit is barred by R. S. 3648, *supra*, p. 2. R. S. 3648 provides that "* * * no advance of public money shall be made in any case * * *" unless otherwise permitted by law and that "* * * in all cases of contracts for the performance of any service * * * payment shall not exceed the value of the service rendered * * *." This statute, enacted by Congress in 1823, is in full force and effect today and furnishes a basic control over the expenditure of public monies.²⁴ This Court has long recognized that R. S. 3648 prohibits the expenditure of public monies before the actual performance of the service, a prohibition which also forbids Government officers to contract for such payment. *The Floyd Acceptances*, 7 Wall. 666, 683; 10 Op. A. G. 288, 301. The statutory touchstone is not benefit to the Government but completion of the performance of the service for

²⁴ Specific statutory authority is required to avoid the prohibition of R. S. 3648. See annotations (cross references) in 31 U. S. C. A. 529. The need for such superseding statutory authority was forcefully illustrated during World War II, as to the point here in issue, by the issuance of Circular No. 7 by the Chief of Transportation, War Department, January 22, 1943, directing transportation officers, pursuant to authority contained in Executive Order 9001, 3 C. F. R. Cum. Supp. 1054, to place on Government bills of lading, covering shipments on vessels of foreign registry, a notation reciting "ocean freight charges hereon stated are now due and payable, cargo being aboard vessel for shipment to consignee" and making reference to Executive Order 9001. Appendix B, pp. 25, 203. Said Executive order was issued pursuant to authority of the First War Powers Act, 55 Stat. 839.

which the Government contracted. *McClure v. United States*, 19 C. Cls. 173, 181; 21 Comp. Gen. 909.²⁵

In other words, no Government officer has power to enter a contract with petitioner which would sanction payment for a service not rendered.²⁶ Recognizing the limitation on its contract of carriage, petitioner asserts that payment of full freight to destination would not “* * * exceed the value of the service contracted for: * * *” (Pet. Br. 26; see also *Waterman Steamship Corporation*, Br. as *amicus curiae*, 15). The Government contends that it can be obliged to pay full freight to destination only where Government cargo is carried to destination, and that any other view of its obligation is in violation of R. S. 3648. *M. K. T. R. R. Co. v. United States*, 62 C. Cls. 373, 376-378, certiorari denied, 273 U. S. 725.²⁷

²⁵ The brief *amicus* filed by *Waterman Steamship Corporation* completely misapprehends the Government's position on this point (brief as *amicus curiae*, 13-15).

²⁶ In *The Floyd Acceptances*, *supra*, at 682, this Court specifically noted “* * * the limitations which it [R. S. 3648] imposes upon all officers of the government.” The United States can neither be bound nor estopped by unauthorized contracts entered into by its agents or employees. *Wilbur National Bank v. United States*, 294 U. S. 120, 123-124; *Utah Power & L. Co. v. United States*, 243 U. S. 389, 408-409; *Yuma Water Ass'n. v. Schlecht*, 262 U. S. 138, 144; *United States v. San Francisco*, 310 U. S. 16, 31-32.

²⁷ The *M. K. T.* case involved a claim by the carrier that a limitation provision contained in its ordinary commercial bill of lading was incorporated by reference into the Gov-

In insisting that full freight to destination is the value of the service contracted for and that such freight is earned by the carrier on receipt of the goods for shipment, the carriers herein pervert the underlying general maritime law. As we have shown, *supra*, pp. 17-26, freight can only be payment for the conveyance of cargo to destination. Although carriers may stipulate that "freight" may be retained or recovered though cargo is not delivered to destination, such payment is not strictly speaking, "freight." This Court, and lower federal courts, have specifically recognized that carriers do not earn "freight" upon receipt of the cargo for shipment. Such stipulations are valid and enforceable, not because the contract of service has been performed, but because the shipper has bargained away its right to insist upon complete performance. Whatever the consideration may be for such bargain, it is not performance. Although such consideration may constitute "value" sufficient, as a matter of contract law, to uphold such a stipulation between commercial shippers and carriers, it is clearly not the "value of the service

ernment standard form bill and that the Government claim against it was therefore barred. It should be noted that the shipment involved was under the 1915 standard form bill which did not contain the specific provision (Instruction 7) as to periods of limitation on claims against carriers which appears in the form here involved.

rendered" to the Government which is contemplated by R. S. 3648.

At bottom, petitioner's whole case rests upon a plea that this Court read into the blunt protective language employed by Congress in 1823, and never thereafter varied, elusive notions of consideration developed long after the enactment of R. S. 3648. Neither in the field of ocean transportation nor in other fields in which the Government contracts, can the meaning of "value of the service rendered" be satisfied by an artificial stipulation which would permit the expenditure of public money for something other than performance. The Government's needs and policy are uniform in all fields, and no basis exists for placing ocean carriers in a preferred status. It is inconceivable that the Government could be absolutely obligated, by a stipulation, to pay the full price for a battleship or a building upon the laying of the keel or the digging of the foundation, regardless of the subsequent inability, without regard to fault, of the contractor to complete performance.

²⁸ Finality of obligation on the part of the Government is the essence of petitioner's contentions. Opinions of the Attorney General referred to by Waterman Steamship Corporation as *amicus curiae* (Br. 15), are irrelevant on this score. In neither opinion is it indicated that the Government could be compelled, by contract, to pay for a service not rendered. Cf. 20 Op. A. G. 746.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment below should be affirmed.

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NOVEMBER, 1949.

APPENDIX A

By order of December 6, 1935, the Secretary of Commerce directed all water carriers engaged in the foreign commerce of the United States, who desired to obtain the protection of Clause 14 of Part II of the uniform through export bill of lading form prescribed by the Interstate Commerce Commission, to file with the Division of Regulation of the United States Shipping Board Bureau of the Department of Commerce certified copies of port bill of lading forms used in connection with the uniform through export bill of lading. The order provided that such file shall be subject to inspection at all reasonable times by any person upon request. The following tabulation of freight clauses of export bills of lading used by water carriers is based on that file, now maintained by the Division of Regulation of the United States Maritime Commission. In general, water carriers utilize one of two standard form freight clauses. That most commonly employed states that full freight, whether stated or intended to be prepaid or collected at destination, is deemed earned on receipt of the goods by the carrier, vessel or goods lost or not lost (column 2). The alternate form provides merely that prepaid freight (or freight stated or intended to be prepaid) is deemed earned on receipt of the goods by the carrier, vessel or goods lost or not lost (column 3). Where a carrier has employed both freight

clauses, the symbol "X" denotes the form currently filed with the Division of Regulation of the Maritime Commission and the date of the superseded form is given in the adjoining column.

Carrier	Collect and prepaid freight	Prepaid freight
Alcoa Steamship Company	X	
Aluminum Line (Alcoa SS Co.)	X	
American Caribbean Line, Inc.	X	
American Export Lines	X	
America France Line	X	
American Gulf Orient Line		X
American Hampton Roads Line	X	
American Pioneer Line:		
Atlantic ports to Australia	X	1935
Atlantic ports to Far East	X	1936
Atlantic ports to India	X	1935
American President Line		X
American Republics Line	X	
American Seantic Line	X	
American South African Line, Inc.	X	
American Trading & Shipping Company	X	
American West African Line	X	1938
Anchor Line		X
Baltimore Cuba Line	X	
Baltimore Insular Line, Inc.	X	
Baltimore Mail Steamship Company	X	1935
Barber Steamship Lines, Inc.		X
Belgian Line	X	
Bernstein, Arnold Line	X	
Black Diamond Lines	X	1936
Bristol City Line of Steamships, Ltd.	X	1936
Bull Insular Line, Inc.	X	
Carriso, Inc.	X	
Castle Line		X
Compania Espanola De Navegacion, Maritima S. A.	X	
Chilean North American Line		X
Clan Line Steamers, Ltd.	X	
Commonwealth & Dominion Line, Ltd. ¹	X	
Compagnie Generale Transatlantique	X	
Compania Transatlantica	X	
"Cosulich" Societa Triestina Di Navigazione		X
Creole Line		X
Cunard White Star, Ltd.:		
Atlantic ports to England	X	1938
Atlantic ports to Nassau and Havana		X
Dixie Mediterranean Line		X
East Asiatic Company, Ltd.		X
Elder Demster Lines, Ltd.	X	
Ellermans Wilson Line, Ltd.		X

¹ The bill of lading of Commonwealth & Dominion Line, Ltd., provides that freight must be prepaid, or in the alternative, that the consignee pay a penalty of 10% of the freight charge. Neither provision could be applicable under the standard form Government bill.

Carrier	Collect and prepaid freight	Prepaid freight
Fern Line		X
Franco-Iberian Line	X	1935
Furness Bermuda Line		X
Furness Pacific Line		X
Furness Red Cross Line		X
Furness Warren Line		X
Furness West Indies Line		X
Garcia Line	X	
Gdynia-America Line	X	1936
Grace Line:		
United States to West Coast of South America		X
United States to West Coast of South America and Mexico	X	
Gulfstates Steamship Company		X
Gulf West Mediterranean Line		X
Hamburg American	X	
Harrison Line		X
Holland America Line:		
Atlantic ports to Holland	X	1936
Gulf ports to Holland		X
Houston Lines	X	
Italia Line	X	
Interocean Steamship Corporation	X	
Java-New York Line	X	
Kokumi Line		X
Larrinaga		X
Lykes Bros.	X	
Manchester Liners, Ltd.		X
Meyer, Richard	X	
Mooremack Lines	X	
Navagazione Liberia Triestina		X
North German Lloyd:		
Gulf ports to Germany		X
North Atlantic ports to Germany	X	
Norwegian America Line	X	1936
N. Y. K.		X
Ocean Dominion Steamship Corp. (Alcoa SS Co.)	X	
Ocean Steamship Company, Ltd.	X	
Oceanic Steamship Company	X	
Odero Line		X
Oriole Lines	X	
O. S. K.	X	
Pacific-Australia Direct Line	X	
Pacific Islands Transport Line	X	
Pacific-Orient Express Line	X	
Pacific Republics Line	X	
Panama Mail Steamship Company		X
Phelps Line	X	1936
Prince Line:		
Atlantic ports to South Africa		X
Atlantic ports to South America	1946	X
Red Star Line	X	1935
Royal Netherlands Steamship Company	X	
Scandinavian American Line:		
Gulf ports to Scandinavia		X
North Atlantic ports to Scandinavia	X	1936
Sea Train Lines, Inc.	X	
South American Line	X	

Carrier	Collect and prepaid freight	Prepaid freight
South Atlantic Mail Line.....		X
Southern States Line.....		X
Standard Fruit & Steamship Company.....	X	
States Steamship Company.....		X
Strachen Shipping Company.....		X
Swedish American Line.....	X	
Union-Castle Mail SS Co., Ltd. (Union Clan Line).....	X	
Union Ocean Transport Co., Ltd.....		X
Union Steamship Company of New Zealand, Ltd.....		X
United States Lines:		
New York to Continental Europe.....	X	
New York to England.....	1938	X
United States Navigation Company, Inc.....	X	
Western Canada Steamship Company, Ltd.....	X	
Wilhelmsen Line:		
Gulf & Atlantic ports to Brazil.....	X	
Wilhelmsen Line/Swedish American Line:		
Gulf & Atlantic ports to France.....		X
Gulf & Atlantic ports to Poland.....		X
Gulf & Atlantic ports to Scandinavia.....		X
Yankee Line.....	X	
Yucatan Line.....	X	

APPENDIX B

B-59485

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, November 7, 1949.

The Honorable The ATTORNEY GENERAL.

Re: Alcoa Steamship Company, Inc. v. United States. Before the United States Supreme Court, No. 271-This Term.

MY DEAR MR. ATTORNEY GENERAL: I have your letter of October 26, 1949, file HGM:SDS, as follows:

The abovecaptioned case, presently being prepared for argument in the Supreme Court during the November sitting, involves a claim by the Steamship Company that ocean freight may be collected by it from the United States under a Government standard form bill of lading, without regard to the fact that the shipment involved was lost by reason of the destruction of the ship through enemy action. We are, of course, contending that, under the Government bill of lading, freight is not earned nor payable unless the goods covered by the bill of lading are delivered and the necessary documents properly accomplished. It is our understanding that the case is a test case, typical of a great many claims now pending before your office, certain of which have already advanced to the stage of litigation.

(1)

We would greatly appreciate a statement of your views on the question involved and request that a report, embodying those views, be prepared by your office. We are particularly interested in establishing the administrative practice, both with regard to the interpretation and application of the Government standard form bill of lading and with regard to the requirement of R. S. 3648, in connection with the Government's liability to pay transportation charges prior to delivery. The petitioning Steamship Company, as well as steamship companies which have filed statements *amicus curiae* in the abovementioned case, have asserted that it has been the uniform practice of the Government to consider that the obligation to pay freight charges was fixed at the point of receipt of the goods by the carrier rather than by delivery of the goods to the consignee; and that this uniform practice has only been varied during the recent war. These assertions do not accord with our understanding of the Government's consistent position and, since the matter has been placed squarely in issue, we are anxious to establish the correct administrative background.

We would appreciate the receipt of a report as soon as possible. I emphasize the urgency of the matter in as much as the Supreme Court set the case down for immediate briefing and argument upon granting the writ of certiorari.

Pursuant to your request I have caused a search to be made of the available copies of decisions of the accounting officers of the United States for the past 100 years, and there are attached copies of various decisions and letters, identified as enclosures by number, which reflect,

as nearly as such search could determine, the conclusions of said officials on the general question here involved. While, in view of the necessity for dispatch with which this search has been conducted, it cannot be stated unequivocally that all decisions upon the question have been consulted or that none has escaped examination, an effort at thoroughness has been maintained and the results show on the whole a continuing steadfastness on the part of said officials in their adherence generally to the proposition that freight is not earned until delivery of the shipment to the consignee or destination is effected.

The decisions of the Second Comptroller of the Treasury (Enclosures 1 to 18), rendered prior to 1894, at which time the Office of Comptroller of the Treasury was established under the Dockery Act of July 31, 1894, 28 Stat. 205, do not generally indicate the specific conditions of the contracts of affreightment involved, with respect to the fixing of liability for prepayment or subsequent payment of freight charges in the event the vessel or goods should be lost. Frequently, the contract of carriage is referred to as a charter-party, while in other cases the term "Bill of Lading" is employed, and in still other cases an agreement is mentioned without further description of the contract terms. In each case, however, it was held that the Government was not liable for the freight charges on goods not delivered to the destination agreed upon regardless of the cause thereof. As early as August 13, 1842, in a circular directed to Navy Agents, Second Comptroller Albion K. Parris specified that "All accounts for freight must be accompanied by bills of lading,

and proof of delivery to the consignee, viz: his receipt for the articles delivered." In communications of September 21, 1843, May 18, 1846, December 29, 1846, March 1, 1847, July 10, 1847, November 3, 1847, February 9, 1848, May 3, 1848, and November 17, 1849, said official considered claims for freight in instances in which the contracts of carriage were not completed. While pro rata freight was allowed in some instances on voyages abandoned short of destination in no instance was there an authorization to pay freight on property not delivered to the consignee or at destination. See enclosures 2 to 10, inclusive.

During the period 1855 to 1870 Second Comptroller J. M. Brodhead had occasion in seven instances to express a like conclusion. See enclosures 11 to 17, inclusive. In the letter dated July 8, 1865, (Enclosure No. 16), which involved the Barque "Whistling Wind," the United States had agreed to pay the owner at the rate of \$9.50 per ton for transporting 450 tons of coal from New York to New Orleans. Enroute the vessel was captured "by a rebel privateer." In denying liability of the Government for the freight claimed, Comptroller Brodhead said: "The authorities are all agreed that when the loss of the vessel is occasioned by perils of the seas, fire, enemies, pirates, etc., there is also a loss of freight," citing, "Phillips, insurance, Vol. 2, p. 353, 354, Parsons, War Law, Vol. 2, p. 385, 391," and stating that "This principle is also laid down in the case of *Blanchard v. Buchman*, 3 Greenleaf 1." The claim for freight was held, accordingly, properly disallowed. A similar holding was made by Second Comptroller Parris

(Enclosure No. 9) concerning the *Bark Rothschild*. There the vessel encountered a storm during a passage from New Orleans to Vera Cruz, Mexico, during October, 1847, and fifty-two public horses died at sea, thirty-one of them being washed or thrown overboard. In holding that no freight could be paid on the thirty-one horses lost, the Comptroller said:

The law upon this point is well settled, in proof of which I might refer to many authorities. I will merely mention the case of *Griggs vs Austin*, 3 Pickering's (Massachusetts) Reports, p. 20, where goods shipped at Boston for Liverpool were lost, by the perils of the sea, within six miles of the latter port. The court decided that the freight having been paid in advance, might be recovered back by the shipper. That case was argued by eminent counsel, and the opinion of the court reviews the authorities and puts the question at rest.

In a decision of February 14, 1863, herewith, enclosure No. 18, Second Comptroller Madison Cutts expressed a like necessity for delivery before payment of transportation charges could be considered as authorized. Likewise on June 27, 1893, upon request of the Secretary of War for advice as to whether vouchers would have to be supported by bills for transportation service performed under public tariffs, Second Comptroller C. H. Mansur stated, enclosure No. 19:

My decision upon the third question is that the vouchers referred to in said decision which are filed in support of payments for transportation service performed under public tariffs, need not be accompanied by

bills, in cases where duly accomplished bills of lading or transportation requests, as the case may be, are filed with the vouchers to which they pertain * * *

The decisions of the Comptroller of the Treasury, rendered subsequent to the establishment of the Office of the Comptroller of the Treasury by the Dockery Act of July 31, 1894, 28 Stat. 205, have, in the main, adhered to the rule followed by the Second Comptroller of the Treasury that the Government will in no event make prepayment of freight charges and is not liable for the payment of freight charges on goods not delivered at the destination agreed upon. See 3 Comp. Dec. 181; 3 *id.* 221; 4 *id.* 544; 7 *id.* 262; 9 *id.* 332; 12 *id.* 746; and letters of March 6, 1901 December 12, 1902, October 29, 1909, and September 23, 1915 (enclosures 20 to 23, inclusive). The decision in 3 Comp. Dec. 181, while stating the general rule referred to above, did sanction the relief of a disbursing officer for charges prepaid on a shipment from Boston to Genoa, Italy, upon a showing that he had been compelled, improperly, to prepay the charges in order to procure the service, but it was stated, notwithstanding the credit given in the disbursing officer's account, that "the United States might have a claim against the carrier for freight advanced in case of failure to deliver." This decision, insofar as it appeared to sanction the prepayment of freight charges in a situation such as there involved, was repudiated shortly thereafter in 4 Comp. Dec. 544 and in the letter of March 6, 1901 (enclosure 20), emphasis being placed in both of the latter decisions upon the inexorable requirements of

section 3648 of the Revised Statutes of the United States. The result reached in the decision in 12 Comp. Dec. 746 was modified in Appeal No. 12863, dated October 31, 1906 (enclosure 24), upon a showing that the loss resulted from a cause under which the carrier was exempt from liability for the value of the goods. In authorizing refund of the entire amount claimed by the carrier upon appeal, because of the showing of peril of the sea, no mention was made of any modification of the previously expressed view as to the operation of section 3648 of the Revised Statutes upon any claim for unearned freight charges, and the conclusion seems justified that, in authorizing refund of the lump sum claimed by the carrier, the fact that freight charges on the lost property was included in said sum was overlooked. In the decision in 12 Comp. Dec. 746, it was said:

The freight was not prepaid, and a contract to prepay it at New York and to become liable therefor, whether earned or unearned, would be in violation of section 3648 of the Revised Statutes, which provides:

“No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States payment shall not exceed the value of the service rendered or of the articles delivered previous to such payment.”

Under this statute and the facts in this case the contract must therefore be construed as an ordinary contract to carry and safely deliver the goods in question and to pay the freight on delivery. Without

delivery the freight is not earned. (*De Sola v. Pomares*, 119 Fed. Rep. 373; *Hagar, et al. v. Donaldson et al.*, 154 Pa., 242.)

The amount disallowed by the letter of September 23, 1915 (enclosure 23), was authorized for payment in the letter of January 8, 1916 (enclosure 25), upon a showing by the carrier that the shipment was delivered at the Mexican port of destination in accordance with the law of Mexico.

In the above cited decisions the Comptroller of the Treasury seems to have held consistently, with the exception of the one instance reported in 3 Comp. Dec. 181, that the prepayment of freight charges or payment of such charges without delivery of the freight was prohibited, putting emphasis in that connection upon section 3648 of the Revised Statutes in 3 Comp. Dec. 221, 4 *id.* 544, 12 *id.* 746 and enclosure 20. The circumstances involved in the case covered by the letter of October 29, 1909, enclosure 22), do not appear to involve a departure from this rule, inasmuch as the shipper, a vendor to the Government, in order to comply with the request for the shipment of potatoes and onions from New Orleans, Louisiana, to the U. S. S. *Dubuque* at Puerto Cortez, Honduras, prepaid the freight charges from his own funds and, while subsequently reimbursed therefor by the United States, the latter recovered the freight charges by deducting the amount thereof from a subsequent bill of the carrier. In 9 Comp. Dec. 332, said official held, with respect to a shipment delivered short of the port of destination, that since was due and payment *pro rata itineris* was

the acceptance of the cargo at a point short of the destination named in the contract of affreightment was under compulsion, no freight whatever denied.

The emphasis placed by the Comptroller of the Treasury upon the provisions of section 3648 of the Revised Statutes seems probably to have resulted from the fact that apparently in the latter part of the 19th or the early part of the 20th century, the carriers of goods by sea were urging that effect be given certain clauses inserted in their bill of lading forms purporting to require the prepayment of the freight charges, with the provision that such charges were to be deemed earned and payable upon delivery of the cargo to the vessel, and were to be retained by the vessel, ship or goods lost or not lost, whether the voyage should be completed or not.

In this connection it is to be noted that the Comptroller of the Treasury, by Departmental Circular No. 62, dated October 29, 1907 (14 Comp. Dec. 967), prescribed, among other forms, the standard Government bill of lading form for use in connection with the transportation of property on which the Government should be liable for the payment of freight charges. The Government bill of lading form so authorized, under the captions "CONDITIONS" and "INSTRUCTIONS," provided, in pertinent part, as follows:

CONDITIONS

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

1. Prepayment of freight charges will in no case be demanded by carriers. Upon

surrender of this bill of lading duly accomplished payment will be made to the last carrier, except where otherwise specifically stipulated.

2. For railway transportation this bill of lading is subject to all the conditions of the uniform or standard bills of lading, and for express shipments to all the conditions contained in the standard form of receipt issued by express companies, except as otherwise specifically provided hereon.

* * * * *

INSTRUCTIONS

1. Government property will be transported on the prescribed form of *Government Bill of Lading*, which will be identified by serial numbers.

* * * * *

8. *Only one copy of a bill of lading will be issued for a single shipment. This bill, when receipted by the agent of the receiving carrier, will be returned to the consignor and by him mailed to the consignee, who will, upon receipt of the shipment, accomplish and surrender the bill to the last carrier. This bill then becomes the evidence upon which settlement for the service will be made* * * *

* * * * *

13. In case of loss or damage to property while in the possession of the carrier, such loss or damage should, when practicable, be noted on the bill of lading before its accomplishment. All practicable steps should be taken at that time to determine the loss or damage and the liability therefor, and to collect and transmit to the proper officer all evidence as to the same.

The conditions and instructions quoted above clearly provide for the rendition of service and the payment of charges therefor in a manner entirely consistent with the provisions of section 3648 of the Revised Statutes.

The Government bill of lading form referred to above was revised on June 19, 1915, by "Department Circular No. 49, 1915," issued by the Comptroller of the Treasury. See "Digest of Decisions of the Comptroller of the Treasury 1894-1920," at page 2489. A copy of the revised bill of lading form is attached as enclosure No. 26. The revised form made no particular change in the "CONDITIONS," except to add that no collection should be made from the consignee, and to drop the reference to railway and express transportation and provide in lieu thereof that "Unless otherwise specifically provided hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier." The instructions shown in the original form as Nos. 1, 8, and 13 are shown in the revised form as Nos. 2 and 6.

The standard Government bill of lading form was again revised by General Regulations No. 69, dated August 24, 1928, issued by the Comptroller General of the United States (8 Comp. Gen. 695), and at another time by General Regulations No. 97, issued by this Office on April 13, 1943 (22 Comp. Gen. 1172). However, the conditions and instructions contained in the succeeding revisions remained substantially the same as those embodied in the 1915 form.

The decision of November 11, 1896 (3 Comp. Dec. 181), operated merely to afford relief to a disbursing officer in prepaying freight charges, because of the particular circumstances there involved. From that time onward, or at least from the dates the conclusion reached therein was repudiated by the decisions of March 29, 1898 (4 Comp. Dec. 544), and March 6, 1901 (enclosure 20), the Comptroller of the Treasury seems to have remained inflexible in his refusal to permit the prepayment of freight charges under any circumstances. With respect to the payment of freight on shipments, or any portion thereof, not delivered at destination, no decision prior to that of May 27, 1918 (24 Comp. Dec. 707), has been found in which the Comptroller of the Treasury expressly sanctioned such payment, the inclusion of freight charges in the refund authorized in the decision of October 31, 1906 (enclosure 24), being due apparently to oversight, only the repayment of the value of the property being intended.

The decision of May 27, 1918 (24 Comp. Dec. 707), involved a claim supported by 2 original and 22 copies of Government bills of lading covering shipments by sea, no accomplished bills of lading or other evidence of delivery being submitted in connection with 22 of the shipments. The two original bills of lading bore the rubber stamp notations "Not responsible for condition or contents on delivery" and "Freight prepaid," and the Comptroller of the Treasury was asked whether the freight charges might be paid, reference being made to an alleged commercial practice whereby the freight charges usually are prepaid or, if collectible only after delivery, to the

practice of insuring such charges. The decision stated that—

Ordinarily payment of transportation charges can only be made upon proof of delivery of the property to the consignee at point designated in the bill of lading, and the transportation company is liable for any loss or damage.

Thus, it seems to have been recognized that the contract of affreightment, represented by the Government bill of lading, precluded the prepayment of freight charges and made proof of the delivery of the shipment a condition precedent to the payment of the freight charges thereon. However, the Comptroller of the Treasury made reference to the fact that the freight [charge] was not insured by the Government and it apparently was through consideration of the fact that the carrier could not look to insurance for collection of any charges that the Comptroller of the Treasury stated:

The liability of the Government for freight charges would therefore arise when the shipment is actually made, whether delivered to destination or lost with the destruction of the vessel.

In other words the Government, and no other party, was to be liable for the payment of proper charges. In arriving at what those proper charges might be the provisions of section 3648 of the Revised Statutes were expressly referred to as being applicable and in that connection it was said:

* * * Under the circumstances outlined in this case the service required to be

performed and for which payment may be made is the delivery of the property to the consignee or an excusable failure to make such delivery, evidence of one or the other of which should be furnished.

What was to be regarded as constituting "excusable failure" to make "delivery of the property to the consignee" was not disclosed in the decision. Neither was there any indication of the basis for determining the amount of any payable charges in event of such "excusable failure." In this connection it is to be noted that the submission from the Navy Department disbursing officer contained the unqualified statement that "The shipments are made subject to all clauses and conditions of bills of lading in use by steamship lines" and this seems consistent with the stamped notations thereon as noted above. The case, therefore, does not appear to establish any determination that payment of charges becomes due upon delivery to carriers for transportation under a Government bill of lading without the performance of service thereunder or that in making payment for service rendered under such a bill of lading the requirements of section 3648 are rendered inapplicable. On the contrary the decision expressly required proof of delivery or "excusable failure." If the decision be given effect as holding that full charges to destination are earned on shipments that do not reach destination, the effect so given would seem clearly inconsistent with the fact that the service contracted for was not in fact rendered and payment of such charges in those circumstances would seem clearly in excess of "the value of the service rendered."

Turning now to decisions rendered in the period subsequent to June 30, 1921, covered by the Budget and Accounting Act, 1921, it is found that in 4 Comp. Gen. 562, decided December 24, 1924, charges were found properly due only as to that portion of a shipment "actually delivered" to the consignee at destination and that charges were not properly payable on that portion of the shipment transferred from steamer to lighter at the destination port but not delivered to consignee due to sinking of the lighter in a storm. The shipment moved on a Government bill of lading. Likewise in 7 Comp. Gen. 86, decided August 1, 1927, there was involved a deduction made from a bill of the United Fruit Company for the value of an article found short on delivery and the value of an article found to have been broken in transit and "freight on the two articles." The carrier's claim for the amount deducted was disallowed in the General Accounting Office and the cited decision sustained the settlement of disallowance. In 10 Comp. Gen. 447, decided April 2, 1931, there was involved a deduction of \$53.31, comprising \$39.78 as the value of materials lost in transit on a shipment via Norton Lilly & Co., and \$13.53 as the freight charges claimed on the lost supplies. This shipment moved on a Government bill of lading and although the charges are mentioned parenthetically in said decision as "prepaid," examination of the original payment record shows that the shipment of which the lost articles were a part was delivered at destination in April 1928, whereas the disbursing officer made payment of the transportation charges claimed on the shipment less the deduction for unearned freight, in

August 1928. The same principle was applied by Assistant Comptroller General Lurtin R. Ginn in a decision of September 9, 1930, in A-33315, enclosure No. 27. On July 31, 1934, in file A-56905, the then Assistant Comptroller General, R. N. Elliott, issued instructions, enclosure No. 28, to the Claims Division of the General Accounting Office to disallow freight charges on articles destroyed in transit, making specific reference in that connection to the terms of the Government bill of lading as clearly contemplating that payment of freight charges was not to be made until the shipment was delivered at destination. In A-63681, October 17, 1935, enclosure No. 29, a like conclusion was reached upon a claim of the Munson Steamship Line.

For a decision in which the requirements of the Government bill of lading, as compared with the provisions of commercial bills of lading, were considered at length, attention is invited to decisions of May 9, 1940, and May 20, 1940, enclosures No. 30 and 31, in A-97190, involving claims of the Norfolk and Washington, D. C. Steamboat Company and the Richmond Fredericksburg & Potomac Railroad Company, respectively. The occasion of the claims there involved was the standing of a vessel of the McCormick Steamship Company on the coast of California. In said decisions it was stated:

In the instant matter the original agreement, as expressed in the Government bill of lading, required, no less than did the original agreement in the case just noted [*Toyo Kisen Kaisha v. W. R. Grace & Co.*, 53 F. (2d) 740], delivery before pay-

ment. Giving effect to that requirement, no right to collect freight prior to delivery could have accrued to the carrier with respect to the shipments here concerned, even in event of an actual loss of cargo and vessel. Surely no greater right accrues where there is involved only a constructive loss of vessel, the goods being transshipped to another vessel of the same carrier and delivered subsequently to the destination specified in original bill of lading.

The shipments involved in these decisions were transported in 1938.

Of special pertinence in the present case is a letter dated June 2, 1941, enclosure No. 32, in file B-16151, addressed to the Alcoa Steamship Company in which that carrier was informed in response to a general inquiry relative to freight charges on shipments lost or destroyed en route while moving under Government bills of lading that, under the jurisdiction of this Office, a decision could not be rendered to it upon the abstract question presented. Its attention was invited, however, as a matter of information, to the provisions of the Government bill of lading forbidding prepayment of charges and stipulating that payment would be made on the presentation of the bill of lading properly accomplished, inviting its attention in that connection to the instructions on the bill of lading directing the consignee to sign the consignee's certificate on the bill of lading upon "receipt of the shipment." For a decision to Alcoa Steamship Company holding the deduction of unearned freight charges was required on its bill for transportation of a part

of a shipment that "perished" in transit, see B-35755, August 2, 1943, enclosure No. 33.

Other decisions of this Office applying the principle that the Government bill of lading by its terms requires delivery as a prescribed condition to the right of the carrier to payment of transportation charges and calling attention to the provisions of section 3648 of the Revised Statutes as precluding payment where delivery is not effected are as follows, enclosures 34 to 41, inclusive:

- B-30734 June 21, 1943, Coastwise (Pacific For East) Line.
- B-30846 September 17, 1943, Bull Insular Line, Incorporated.
- B-42113 November 25, 1944, Luchenbach Steamship Company, Incorporated.
- B-43523 March 27, 1945, United Fruit Company.
- B-41370 July 21, 1945, Lykes Bros. Steamship Company, Incorporated.
- B-43023 August 9, 1945, Waterman Steamship Corporation.
- B-53596 November 24, 1945, Matson Navigation Company.
- B-25057 April 11, 1944, Barber Steamship Lines, Inc.

Looking now at the few instances of decisions of the accounting officers to which the carriers have made reference at times as justifying their contention that the terms of their commercial forms of bill of lading should prevail over those pre-

scribed in the Government bill of lading, it is found that they comprise the following decisions:

24 Comp. Dec. 707.

21 Comp. Gen. 909.

A-24222, August 31, 1943.

A-24222, May 11, 1944.

A-24222, October 12, 1944.

The first of the above cited decisions, 24 Comp. Dec. 707, has been the subject of comment hereinabove and need not be further considered here. The decision reported in 21 Comp. Gen. 909 had to do with shipments as to which it was indicated that consignees' receipts, establishing delivery to them in the Philippine Islands or Guam, could not be obtained due to the chaotic war conditions maintaining in those islands at the time in question. The decision was based upon a submission which expressly proposed that the payments concerned be supported by "a certified copy of dispatch or letter reporting that the particular vessel has discharged cargo at the port to which shipment was destined." Obviously, this decision cannot be taken as authority for the payment of charges on a shipment moving under a Government bill of lading without a showing that the service of transportation called for has been performed.

Concerning A-24222 of August 31, 1943, and May 11, 1944, addressed to the Administrator, War Shipping Administration, it is clear that said decisions were rendered in recognition of the fact that the War Shipping Administration, a Government agency, constituted the carrier, and that, as such carrier, it had found it necessary to

adopt a form of bill of lading suited to its operations in serving both the public and the Government. The War Shipping Administrator was vested under Executive Order 9054, February 7, 1942, and Executive Order 9244, September 16, 1942, with special emergency powers pursuant to the First War Powers Act, 1941, 55 Stat. 838.

— See in this connection War Shipping Administration General Order No. 16, issued July 6, 1942, 7 Federal Register 5246, prescribing the use of "War Shiplading 7/1/42." It is obvious that there was sufficient justification on the part of this Office in not taking objection to the proposed use of said bill of lading with respect to Government shipments when handled by the War Shipping Administration as carrier.

Concerning the communication of October 12, 1944, addressed to Barber Steamship Lines, Incorporated, in file A-24222, it is to be noted that said letter was written in response to a request from the carrier for information as to whether the "remarks" made in A-24222 of May 11, 1944, addressed to the Administrator, War Shipping Administration, would have equal application to transportation services provided for United States Government Departments and Agencies on vessels other than those owned by or under charter to War Shipping Administration. The reply of October 12, 1944, answering affirmatively the carrier's question and stating that payment of ocean transportation charges might be made to ship lines under the same procedure as theretofore approved for payments to the War Shipping Administration, was preceded by the statement "It is presumed that you have reference to

foreign vessels and in particular the Norwegian vessels for which it is understood your line acts as agents * * *." It is particularly to be observed in this connection that such acquiescence as may be afforded in that letter to the request of the carrier for extension of the principles and procedures previously adopted with respect to shipments handled by the War Shipping Administration was expressly conditioned upon the use, wherever practicable, of the Warshiplading "or a form incorporating the same terms and conditions" to be certified in the same manner as prescribed for the Warshiplading. Whatever may be the effect of said letter with respect to shipments made on documents such as there designated, that letter did not pertain to shipments made, as here, under Government bills of lading. The situation as to shipments made under Government bills of lading had been the subject of consideration in correspondence between the Barber Steamship Lines, Inc., on the one hand and the Maritime Commission and the War Shipping Administration on the other hand during the months of August, September, and October 1944. Said carrier transmitted to this Office with its letter of October 31, 1944, photostatic copies of said correspondence, which included a letter of August 19, 1944, from the United States Maritime Commission to the carrier, stating:

Your public voucher forms submitted for payment in the amounts of \$241.50, \$270.20, and \$272.90, covering ocean freight transportation on shipments of operating equipment from New York to Lagos, Nigeria and Takoradi on the S. S. *Siranger*, are returned herewith.

In accordance with an opinion by our Legal Division, payment of freight in this instance, under the terms of the Government bill of lading and the Comptroller General's decision, is not authorized. The Government form bill of lading by clause 1 expressly provides that delivery of the goods to the consignee is a condition precedent to payment of freight, and by clause 2 incorporates a provision contained in another document to the effect that freight is irrevocably earned on shipment, ship or cargo lost or not lost. Since the two clauses are directly contradictory, the rule of construction is that the specific clause contained within the four corners of the contract will prevail over a clause, where, in order to determine its provisions, reference dehors the contract must be made.

Accordingly, we are unable to process the subject vouchers for payment.

Upon a request from the carrier for a further consideration of the question in the light of certain rubber stamped notations, said to have been placed upon the bills of lading involved, the War Shipping Administration in a letter of October 4, 1944, reaffirmed its prior conclusion, stating in part as follows:

As informed you, we submitted copies of your letters of August 30 and September 11, to our Legal Division for further review and decision, and we are now in receipt of advice to the effect that the information conveyed to you in our letter of August 19, is controlling. However, you have the liberty, of course, to submit the question to the Comptroller General of the United States for a decision.

In order that you may be thoroughly familiar with the position of our General Counsel with respect to this subject we quote herewith the following:

“ ‘Barber Lines’ letter of September 11 quotes at length the Comptroller General’s letter of May 11. A copy of the Comptroller’s letter in question is attached to Traffic Regulation 7-A—Operations Regulate the opinion reported in 21 DCG 909 which considerable language which seems to favor the carrier’s right to retain freight after the cargo is loaded even though the vessel or cargo may thereafter be lost. That language involved a situation where WAR-SHIPLADING only would be used and there would not be any clause involved such as Clause 1 of the Government Form Bill of Lading. That letter therefore could not be taken to mean that the Comptroller General would no longer adhere to the opinion reported in 21 DCG 909 which involved a shipment under a Government Bill of Lading incorporating a carrier’s regular form bill of lading.”

“Barber Lines” letter of August 30 points out that in the present case the Government Bill of Lading in addition to the regular printed incorporating clause (Clause 2) contained the following stamped provision:

“ ‘Subject to all the terms, conditions and exceptions of the Line’s regular form of bill of lading, and where any conflict occurs between this form and the Line’s form the latter’s terms, conditions and exceptions are to govern.’ ”

“If that stamped clause is valid and would be given effect, the conclusion stated in our memorandum of August 9 would be correct. However, I question whether the

Comptroller General would permit the use of or give effect to such a stamped provision. Nowhere in the Comptroller General's Regulations is any authority given to change any terms of the contract or add new terms or to make any notations except of course such matters as the name of the ship, the name of the shipper, description of the goods, etc. (Section 8 which prescribes such matters as the size, color of the paper and other details of the Government Form Bill of Lading, provides that 'no departure from the exact specifications of the standard bill of lading forms herein approved will be permitted. * * *') Obviously a provision of the contract is of considerable more importance than such matters of form as the size of the bill of lading. Moreover, a further provision in respect to the form of transportation vouchers provides that '* * * in reproducing the said voucher forms outside the Government Printing Office the exact size, wording, and arrangement as approved by the Comptroller General of the United States must be adhered to. * * *' Accordingly, I question whether the stamped clause is valid."

It seems clear enough, therefore, that the correspondence above noted from file A-24222 affords no basis for the conclusion that charges are earned and payable without delivery at destination where the shipments are transported pursuant to Government bills of lading. Copies of the letters under file A-24222 and of Barber Steamship Lines letter of October 31, 1944, are enclosed, designated enclosures Nos. 42 to 45 inclusive. The attachments to the letter of October

31, 1944, are included as a part of enclosure No. 45.

As reflective of the fact that the Government bill of lading, by its terms, prohibits what the carriers urge is the necessary effect in this case—namely that the carriers, upon receipt of shipment at point of origin, become entitled to collect full freight charges applicable for transportation to destination and to retain said charges without any showing of delivery at destination, ship or cargo lost or not lost—attention is directed to Circular No. 7, issued January 22, 1943, by the Chief of Transportation, War Department, having to do with the payment of ocean freight charges on ships of foreign registry. Said circular, enclosure No. 46, was, in part here material, as follows:

Prepayment of Ocean Freight on Ships of Foreign Registry.—1. The following instructions from the Commanding General, Services of Supply to the Chief of Transportation dated January 9, 1943 are published for the information and guidance of all concerned:

“1. Pursuant to authority contained in Executive Order 9001 and to the delegation of authority contained in instrument dated September 15, 1942 from the Under Secretary of War to the Commanding General, Services of Supply, it is hereby directed that notwithstanding provisions to the contrary contained in Government bills of lading, ocean freight charges on cargoes to overseas destinations carried in vessels of foreign registry, not chartered by, controlled by, nor operated by the War Shipping Administration, shall be due and pay-

able after the completion of the loading of the cargo on board the vessel for shipment to the consignee.

"2. The above action is predicated upon a finding by me that under the circumstances involved, this procedure is necessary to and will facilitate the successful prosecution of the war effort."

2. Transportation Officers when called upon to handle overseas shipments of the above character will observe the foregoing by causing the following entry to be placed on Government bills of lading relating to the above cargoes:

"The ocean freight charges hereon stated are now due and payable, cargo being aboard vessel for shipment to consignee, and necessity for prepayment having been determined by Commanding General, Services of Supply acting under Executive Order 9001 as necessary to and will facilitate the successful prosecution of the war effort."

The assumption seems entirely justified that this circular was issued in recognition of the well established principle that the Government bill of lading provides for delivery at destination as a condition to payment and that without the authority there exercised under the superseding statutory authority of the First War Powers Act, 1941, payment for transportation of such shipments, not delivered at destination, would have been precluded by section 3648 of the Revised Statutes.

Also, on the proposition that any contract, whether Government bill of lading or commercial bill of lading, which undertakes to require the United States to pay through charges to destina-

tion even though the transportation services necessary to effect delivery at destination are not in fact performed—as in the case of frustrated shipments delivered at an intermediate port because of interruption to traffic—would contravene the prohibition contained in section 3648 of the Revised Statutes against payment in excess of the value of the services rendered, there would appear to be of especial significance the statement of Admiral E. S. Land, War Shipping Administrator, in a letter to the Committee on Merchant Marine and Fisheries, House of Representatives, as reported in the Hearings on House Joint Resolution 92 (78th Congress, 1st Session), Public Law 41, 57 Stat. 68, authorizing the refund by the War Shipping Administrator of certain freights paid by commercial shippers for transportation on frustrated voyages, said statement being in part as follows:

The voyages in question were frustrated by the Japanese attack on Pearl Harbor. Refunds are sought by the shippers and consignees of freight paid on cargo that was short landed as a result of the voyage frustrations.

* * * * *

These claims are supported, in equity and fairness, if not in law, by the fact that the cargo owners have paid for a service which they did not receive. In many instances, the vessel never left the loading berth. In others, a part of the contract voyage was completed prior to the frustration. In such instances, the carrier of course incurred some expense, but not to the extent of the full freight. The excess of receipts over expenses, if retained by the

carriers, would appear to be a windfall to them. [Italics supplied.]

The War Shipping Administrator's recognition of the windfall to the carriers, and of the inequity to the private shippers, that would obtain, if the carriers were to be allowed to retain freight charges paid but not in fact earned, would appear to be pointed with added emphasis, when consideration is given the fact that in the transaction here in question public monies are involved and that the Government, as a shipper, is subject, in contracting for a transportation service, to the legal limitation imposed by section 3648 of the Revised Statutes. It is deemed worthy of note, too, that the report of the Senate Committee on Commerce on the joint resolution cited above, Senate Report No. 178, contained the following persuasive comments:

* * * Moreover, an expression by the Congress through the medium of this legislation will provide a standard of business conduct in this situation which might well be followed by other carriers concerned with the problem, including commercial operators and public agencies responsible for ships operated by nationals of our Allied Governments. * * *

The view that the Government bill of lading and the requirements of section 3648 of the Revised Statutes preclude the payment by the United States for a service not rendered in fact would seem patently consistent with what is thus indicated as being a desirable objective commercially.

It has been the consistent practice of this Office not to authorize payment for transportation charges for services not rendered and to author-

ize payment only when the contract of affreightment has been fully or substantially performed.

This is true of cases involving varied factual circumstances which may be classified, as follows:

1. Cases involving total loss of goods, as illustrated by decision of June 2, 1941, B-16151, (Enclosure No. 32), and decision of September 17, 1943, B-30846 (Enclosure No. 35).

2. Cases of partial loss of cargo, as in decision of August 2, 1943, B-35755 (Enclosure No. 33).

3. Cases involving frustrated voyages as in the decision of November 23, 1946, B-53596 (Enclosure No. 40), and the decision of June 21, 1943, B-30734 (Enclosure No. 34).

4. Cases where cargo was delivered at destination but carrier could not furnish duly accomplished Government bill of lading as shown in the decision of April 7, 1942, B-24613, 21 Comp. Gen. 909.

5. Cases involving payment *pro rata itineris* as covered by decision of November 25, 1944, B-42113 (Enclosure No. 36).

A careful consideration of the matters indicated above will disclose that there has been found, in the examined decisions and instructions of the accounting officers of the United States on file in this Office, no basis of support for the assertion of the steamship companies, as reported in your letter, to the effect that it has been a uniform practice of the Government to consider that the obligation to pay freight charges was fixed at the point of receipt of the goods by the carrier rather than by delivery of the goods to the consignee and that this uniform practice has been varied only during the recent war. On the contrary,

the specific instructions, decisions, and administrative determinations, designated hereinabove, reflect a generally persistent refusal of the accounting officers to accept the view that payment is earned upon delivery of the shipment to the carrier. They show instead repeated affirmations of the principle that delivery to the consignee or at destination is necessary to payment.

Sincerely yours,

LINDSAY C. WARREN,

Comptroller General of the United States.

Enclosures

ENCLOSURE NO. 1

DECISIONS OF SECOND COMPTROLLER OF THE
TREASURY, VOLUME 9, PAGES 367-369

AUGUST 13, 1842.

Circular to Navy Agents:

SIR: In addition to my circular of the 22nd of March last, I have thought it my duty to call your attention to the following regulations, established for the Government of Navy Agents in making their disbursements and in rendering their accounts for settlement.

1st. In all accounts for articles purchased, the date of each purchase, the name, number, price, etc., of each article must be distinctly specified in the account. All receipts for payments of money must ~~express~~ the amount paid, in words written at full length and all receipts and approvals upon accounts must bear the date when they were written.

2d. In all cases, the original receipt /voucher/ for the payment of money must be produced and

filed with the account, in the proper office of the Treasury, and this cannot be dispensed with, except in cases where the original shall have been lost, beyond the control of the person in whose favor the receipt was given. In this case only, when accompanied by satisfactory proof to this effect, will duplicate vouchers be admitted.

3d. All contracts made by virtue of any law of the United States, which may be in any manner connected with the settlement of public accounts in this office, are required to be deposited in the Office of the Second Comptroller of the Treasury within ninety days after their dates, respectively. /See Act of 16th July, 1798, Sec. 6/. And all such contracts must be so deposited before vouchers for the payment of money under them, will be admitted to the credit of any disbursing officer. When money is disbursed under a contract, the voucher should show this fact, and the date of the contract.

4th. In all cases where public money is paid for services or supplies which may have been rendered or furnished the Government, the *purpose* for which they were required should be distinctly stated in the account /voucher/ as this is indispensable to enable the accounting officers to determine upon what appropriation the expenditure should be charged.

5th. In making up accounts due care should always be taken to charge every expenditure upon the proper appropriation; and should items chargeable to different appropriations be embraced in the same voucher, /as is sometimes the case/ they must be separated and charged to the proper heads; and in no case should the aggregate

amount of such voucher be charged upon one appropriation to relieve another, as this would be, in effect, making transfers of money, contrary to law.

6th. All stoves, grates, fixtures of every kind, cooking utensils, carpeting, and furniture for national vessels, are chargeable upon the appropriation "for increase, repair, armament, etc., of the Navy"; and when required for furnishing buildings or offices attached to a Navy Yard, they are chargeable upon the appropriation for that yard.

7th. All accounts for freight must be accompanied by bills of lading, and proof of delivery to the consignee, viz: his receipt for the articles delivered.

8th. No part of the money appropriated by the 19th paragraph of the Act making appropriations for the Naval Service for the year 1842, can be expended except for the objects therein particularly mentioned. All expenditures for other purposes must be charged to other and proper appropriations. The 19th paragraph, being the *specific contingent* appropriation, is in the following words, viz:

For defraying the expenses that may accrue for the following purposes, viz:

For freight and transportation of materials and stores of every description; for wharfage and dockage; storage and rent; travelling expenses of officers, and transportation of seamen; house-rent to pursers when duly authorized; for funeral ex-

penses; for commission, clerk-hire, office-rent, stationery and fuel to Navy Agents; for premiums and incidental expenses of recruiting; for apprehending deserters; for compensation to judge advocates; for per diem allowance to persons attending courts martial and courts of inquiry or other services authorized by law; for printing and stationery of every description, and for making the lithographic press; for books, maps, charts, mathematical and nautical instruments, chronometers, models and drawings; for the purchase and repair of fire-engines and machinery; for the repair of steam-engines in Navy Yards; for the purchase and the maintenance of oxen and horses, and for carts, limber wheels and workmen's tools of every description; for postage of letters on public service; for pilotage and towing ships of war; for taxes and assessments on public property; for assistance rendered to vessels in distress; for incidental labor at Navy Yards, not applicable to any other appropriation; for coal and other fuel, and for candles and oil for the use of Navy Yards and shore stations, and for no other object or purpose whatever, four hundred and fifty thousand dollars.

The term *machinery* in this paragraph, used as it is, in connection with fire-engines, is considered as meaning machinery for those engines. All expenditures for machinery for other purposes, must be charged to other appropriations.

(Signed) ALBION K. PARRIS.

T.P. and A.K.P.

[COPY]

ENCLOSURE NO. 2

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY,
VOLUME 10, PAGE 30

JULY 7, 1843.

Decision in the case of the Schooner "Marietta":

I have examined the annexed statement of the case arising on the claim of the owners of the Schooner *Marietta*, for freight on a quantity of Military Supplies, belonging to the United States from Baltimore to Cedar Keys in Florida.

The statement appears to have been prepared by the Quarter Master General, and is supposed to embrace all the material facts in the case.

On these facts, I am clearly of opinion, that the owners of the *Marietta*, are entitled to a *pro rata* freight only, to be computed according to the benefit which the United States as the freighter had actually received; that is to say, the freight from Norfolk, where the goods were received to Cedar Kays, the port of delivery, should be deducted from the freight of the whole voyage, and the remainder to be a charge on the freighter, which will be the amount of freight due the owners of the *Marietta*, from the United States.

This is the rule adopted by the Supreme Court of Massachusetts in an opinion delivered by Chief Justice Peasons, in the case of *Coffin v. Stover*, 5th Mass. Reports, 252, and the principle is well sustained by other authorities.

(Signed) ALBION K. PARRIS.

[COPY]

ENCLOSURE NO. —

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 10, PAGE 89, 90, 91, 92, 93, 94

Case of the Schooner "Marietta"—Decision of the Comptroller:

The owners of the Schooner *Marietta*, having requested a reexamination of their claim, against the United States, on the ground that my former opinion given in the case, was predicated on an erroneous statement of the facts, I have obtained all the papers, from the office of the Quarter Master General, and given them a thorough examination.

The undisputed facts in the case, are that on the 11th of August 1842, Capt. Dusenberry, Assistant Quarter Master, in the U. S. Army, shipped on board the *Marietta*, at Baltimore, a quantity of Subsistence Stores, the property of the United States, which the owners of the Schooner, by bill of lading in due form, through their Captain, contracted to deliver at the port of Cedar Keys, in Florida, unto the assistant Quarter Master of the U. S. Army, at that place.

The Schooner encountered a storm on her outward passage and becoming disabled by the perils of the Sea, was obliged to put into Norfolk for repair. The cargo was landed and put into the hands of Messrs. Myers & Co. Agents for the owners of the vessel, who, on the 29th of August, wrote Capt. Dusenberry, informing him that the Schooner had put into Norfolk, in distress and

on the 30th they wrote again to Capt. Dusenberry, stating that one third of the cargo will be found damaged, and that they give this information thus early that he, Dusenberry, "may decide, whether to order the damaged portion to be sold here, (Norfolk) and let the vessel proceed with the undue, or whether you (Dusenberry) will sell the whole *and terminate the voyage here.*

Capt. Dusenberry replied to Myers & Co., on the 31st of August, and informed them that he had referred their letter to Capt. Irvin, Assistant Quarter Master, at Fort Monroe, and requested him to give such attention to the subject matter thereof, as the interests of the public service, may require.

On the 1st. of September, the Commissary General of Subsistence, wrote to Capt. Green, an Assistant Commissary of Subsistence, at Fort Monroe, informing him of the situation of the Subsistence Stores, and directing him, if the Assistant Quarter Master at Fort Monroe, has not attended to it; to proceed and examine the Stores, sell those that are damaged, and let those in good preservation, *go on to Cedar Keys, in the vessel when repaired.* If however, there should be no opportunity of forwarding the good stores, to Cedar Keys, you will take them yourself."

On the 9th of September, Myers & Co. wrote to Capt. Dusenberry, that they had made report to Capt. Irvin, of the articles sold, and they add, "we should like to know whether when the vessel is repaired, you design her to proceed on the voyage with the good portion of the cargo, or to make some other disposition of it, and terminate the voyage here. (Norfolk) *we presume it can*

hardly be an object with the Government, for her to proceed with the remnant left."

On the 13th of September, Capt. Dusenberry replied, "*It is certainly, an object to the Government that the Marietta should proceed on the voyage, as soon as she is repaired.*"

On the 24th September, Capt. Irvin wrote to Myers & Co. as follows, "I have just received directions from the Commissary General, to turn over the good provisions in your hands, to Capt. Green. Please send them, per Star, at your convenience, and also, pay over to Capt. Green, the proceeds of your sale, deducting your expenses.

"*I can say nothing as to whether the 'Marietta' will be paid her freight this far or not, until I get instructions from the Quartermaster General.*"

On the 28th of September, Myers & Co. wrote Green, as follows: "we have received a letter from Capt. Irvin directing us to send you by the Star, the remnant of a cargo of provisions, left in our hands by the Captain of the Schooner *Marietta*," etc.

No objections to this arrangement, were made, either by Myers & Co. or by the Captain or owners of the *Marietta*, and the portion of the provisions unsold, were sent to Capt. Green, and received by him, on the 4th of October.

On the back of the bill of lading, is this endorsement, in the hand writing of one of the firm of Myers & Co.:

"Norfolk, Oct. 4th 1842. The within mentioned articles have all been received by me, at this port, in consequence of the Schr. *Marietta*,

having put in here, in distress, and been discharged by the Commissary General, from the farther prosecution of the voyage." This endorsement is signed by Capt. Green.

Capt. Green, in his letter of the 18th of October 1842, to the Commissary General, states: "It was not possible for me to comply with the instructions of your letter of the 1st. of September, as Capt. Irvin had already given directions to the merchants in Norfolk, for the distribution and disposal of the cargo. I regret if any mistake has occurred respecting my signing the bill of lading. It was not my intention to sign, otherwise, than for the articles received here, (Fort Monroe) and for those articles sold at auction in Norfolk, the amount of sales having been placed in Bank, to the credit of the Department. Indeed, I certainly was not authorized to discharge the vessel, and was not aware that my certificate was to that effect."

The Commissary General states that Capt. Green was not authorized to discharge the Schooner, and has so certified on the back of the bill of lading.

Capt. Irvin, in his letter to the Quarter Master General of the 29th of May last says, "I never saw or had any communication with the Captain or owners of the *Marietta*. I had nothing to do with any one, except the Agents, Myers & Co. and with them, I certainly, never made any agreement, or gave any orders, terminating the voyage. My letter of the 27th of September 1842, will show that I had no such understanding."

Capt. Green, in a letter to the Quarter Master General of the 17th of June 1843, says, "I am in

total ignorance of and cannot conceive how it was possible for me to append my official signature to such an unauthorized certificate."

I have given a fair abstract of the case, and there does not appear to my mind, much difficulty in understanding it. In the first place, I am satisfied that in strict law, Capt. Green had no authority to discharge the Schooner—that authority resting entirely with the Quarter Master's Department, with which the ship owners contracted—and that the Subsistence Department to which Capt. Green belonged, had no control whatever, over contracts entered into by the Quarter Master's Department, and consequently could not modify annul or discharge them.

In the second place, I am satisfied that Capt. Green did not assume to exercise any such authority. The certificate that he signed, does not state that *he* discharged the Schooner, but that she "had been discharged by the Commissary General, from the further prosecution of the voyage." Such was not the fact. There is not a particle of proof in the case, that the Commissary General undertook to do any such thing, but on the contrary, expressly directs to have the stores go on to Cedar Keys, in the vessel, when repaired.

Finally, from the tenor of Messrs Myers & Co's letter to Capt. Dusenberry, of the 9th of September, it is apparent that the owners were willing of not anxious, to have the *Marietta* relieved from proceeding on her voyage. This could not be done without the consent of the shipper. Capt. Dusenberry's reply of the 13th of September, advertised the owners that they were to be held to their contract. They could, therefore, obtain

no release from the Quarter Master's Department, and Capt. Irvin, when as Assistant Quarter Master, he consents to take the goods, by authorizing their delivery to Capt. Green expressly warns the owners, that there may be doubt whether any freight will be paid.

Notwithstanding this admonition, the goods are delivered, an entry made on the back of the bill of lading, which the owners *now* contend is equivalent to an interruption of the voyage, by the freighter, against their consent.

This would not have been their course of procedure, if they had been disposed to have prosecuted the voyage. In that case, their answer to Capt. Irvin would have been prompt and decisive, to this effect: "Sir, If you can say nothing as to whether the *Marietta* will be paid her freight *this far*, even," (~~That is to Norfolk~~) we will instantly settle that doubt: We will not deliver you a particle of your goods, but proceed to prosecute the voyage."

If they had done so, who would have interposed an objection? Not the Quarter Master's Department, for Dusenberry had already told them, that it *was* an object for the Government, that the *Marietta* should proceed on her voyage, as soon as she is repaired. Not the Commissary's Department, for directions had been already, given by the head of that Department to have the stores in good preservation go on to Cedar Keys, in the vessel when repaired.

The remark of the Messrs. Myers & Co. in their letter to Capt. Dusenberry, that "we presume it can hardly be an object with the Government, for the vessel to proceed with the remnant

left, "shows that they did not expect freight for the whole voyage, if the voyage should be terminated at Norfolk. If the Government was at all events, to be chargeable with freight for the whole voyage, it would most certainly, be an object to have the goods delivered at the original port of destination. If *Pro Rata* freight only, was to be charged, the Messrs. Myers & Co. might well presume "it would hardly be an object to the Government to have the voyage prosecuted."

There might have been various reasons why the owners preferred to have the voyage terminated at Norfolk. It appears by the Master's protest, and the survey held on the *Marietta*, that she needed extensive repairs. It might not have been convenient for the owners to place the vessel in a sea-worthy condition in proper season to pursue the voyage, and if that could have been done, more profitable employment might have offered. By whatever reasons, they might have been influenced, it is very apparent that they were willing, and the officers of the Government unwilling to have the voyage abandoned.

On the whole, I should be doing injustice to the fair mercantile character of the Messrs. Myers & Co., to infer that they had any object in taking from Capt. Green, the acknowledgement, in writing on the back of the bill of lading, except to show that he had received the articles shipped, and to relieve the owners from accountability therefor. I am unwilling even to entertain a suspicion that in this transaction an attempt was made to circumvent the Government by obtaining from one of its Agents, a certifi-

cate of a fact, which had no existence. They might with fairness, obtain such a certificate, on delivery of the goods as would entitle the owners to a pro rate freight, but that they expected Capt. Green or any other officer of the Government to certify that the Marietta was discharged from the further prosecution of the voyage, *against the consent of the owners*, or that they intended to prepare a certificate for him to sign, of that purport or susceptible of that construction, I do not believe, as it would be wholly inconsistent with all the facts bearing upon that point, in the case.

But let the construction to be put upon Green's endorsement, be whatever it may, it is not contended that the owners of the Schooner, made any provision to transport the goods in another vessel, or claimed the right to pursue the voyage, with the Marietta, when repaired, or that they made any objection to the delivery of the goods to Irvin or Green. It was a voluntary act on the part of the ship-owners, which they might have declined at their pleasure. Taking all the circumstances into consideration, I think the further prosecution of the voyage was abandoned or waived by both parties. Not having objected, their assent is to be inferred.

Now, what is the law in such a case? "If the freighter accepts the goods, at the intermediate port, freight is to be paid, according to the proportion of the voyage performed, and the law will imply such a contract." It is settled law that pro rate freight only, is due, where the ship, by inevitable necessity, is forced into a

port short of her destination, and being unable to proceed on her voyage, the goods are there voluntarily accepted by the shipper.

If the cargo is not conveyed to the place of its destination, no freight can be demanded. If voluntarily accepted, at any other port, by the freighter, freight pro rate is due. I know of no reported case, of any authority, where freight was allowed *for the entire voyage*, when such voyage had not been performed, the ship by reason of perils of the sea, having gone into an intermediate port to refit, and the goods having been there, voluntarily received by the freighter, with the consent, and in accordance with the wishes of the ship-owner. But the books are filled with cases, where, under such circumstances, a *pro rate freight* was allowed.

It is only in a case where the master or ship-owner offers to complete the voyage, and the freighter will not consent, that full freight can be claimed. If the owners of the *Marietta*, and manifested any unwillingness to deliver the cargo at Norfolk, their claim to full freight, might have had some semblance of equity. But when, instead of resisting, they virtually invite the delivery, and make it without objection, notwithstanding the intimation of doubt by the freighter, whether any, even a pro rate freight would be paid, a claim to freight for the entire voyage, could find no countenance either in law or equity.

(Signed) ALBION K. PARRIS,
Comptroller, etc.

SEPT. 21, 1843.

ENCLOSURE NO. 3

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY,
VOLUME 11, PAGES 249-250

MAY 18, 1846.

Maj. Gen. JESUP, *Quartermaster Gen.*

SIR: I have received the paper's relating to the case of the Schooner *Magnet* and have carefully examined all the legal authorities within my reach applicable to said case.

The facts, I understand from the papers are that on the ninth of December 1845 at New Orleans the *Magnet* was chartered for the sum of eight Hundred and fifty dollars to take on board and transport for the Quarter master's department to Aransas Bay in Texas such cargo of public stores etc. as the Deputy Quarter master General at New Orleans might see fit to ship in her, and to land and deliver the same at St. Joseph's Island in Aransas Bay to the Officer in the Quarter master's department there, and on the faithful and satisfactory performance of the contract on the part of the owners of the Schooner, the said Deputy Quarter master General agreed to pay the stipulated sum above mentioned of eight hundred and fifty dollars—that on the 16th of said December sundry articles of public property were shipped in said schooner, and on the same day she departed on her voyage, but before reaching her destination she was wrecked. A portion of the cargo was saved by the Officers of the United States and the remainder was lost, no part having been delivered at the place of destination agreeably to the stipulations of the contract.

The law seems to be well settled that in such a case no freight is due under the charter party. The contract of affreightment is considered as an entire contract and unless fully performed by the delivery of the whole cargo no freight can be legally claimed. The delivery of the whole cargo is a condition precedent to the recovery of freight.

All the papers in the case are herewith returned.

Respectfully,

(Signed) ALBION K. PARRIS.

ENCLOSURE NO. 4

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY,
VOLUME 11, PAGE 379

DECEMBER 29, 1846.

Col. H. STANTON, *Apr. Q. M. Genl.*

SIR: I have examined the papers relating to the claim of *Capt. Hallock* for freight of sundry store shipped on board the *Schooner Brave* for transportation from New York to Brazoa Santiago. I understand that the *Brave* was a general ship and that the freight stipulated to be paid by the U. State was according to the quantity of goods shipped which are particularly set forth and described in the bill of lading. In such a case freight is due for what the ship delivers, and nothing more. This case is distinguishable from that of the *Magnet* decided by me some time ago. In that case the ship was chartered for a specific sum, for the voyage, and no part of the cargo was delivered at the point of destination and of course no freight was earned. I notice in the

case of the *Brave* that a part only of the cargo shipped by the U. State was delivered. The Master should account for the residue, and if a part or the whole of *that* was thrown overboard to lighten the ship as appears probable from the Protest of the Master filed in the case the loss should be borne, as general average, by the owners of the ship and the cargo saved. All the papers received with your letter of the 16th inst. are herewith returned.

I am very respectfully Yours,

(S) ALBION K. PARRIS.

AKP.

[COPY]

ENCLOSURE NO. 5

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY,
VOLUME 11, PAGES 423, 424

MARCH 1, 1847.

Col. HENRY STANTON,

Asst. Quarter Mr. Genl.

SIR: I have examined the papers received with your letter of the 27th ulto. in support of the claim of *Henry Sadler*, Master of the Brig *Mount Vernon* for freight on sundry government stores and horses, shipped on board said brig at New Orleans for Tampico, Mexico.

I notice by the receipt on the back of the Bill of Lading that a small part only of the property shipped has been delivered and for that part the freight is claimed. By the protest of the Master

it appears that the Brig encountered violent gales of wind, and for the safety of the vessel and other parts of the cargo, the Captain was compelled to throw overboard a portion of the hay mentioned in the bill of lading. That loss should be remunerated by general average contribution assessed on the vessel freight & cargo saved.

In regard to the horses; if they were properly secured and taken care of and were lost by the perils of the sea, the loss must be borne by the shipper; but if they were lost through the negligence of the ship owner or his agents, the loss must fall on him. If they were lost by being thrown overboard for the safety of the vessel and the lives of the crew, the loss is to be borne by general average, as stated above.

No mention is made in the protest of throwing overboard any of the cargo other than the hay and horses. For the residue, viz: the coal, the boards, the horsebuckets and thirtyeight bundles of hay, no account is given, and as they were not delivered to the consignee nor lost by the perils of the sea, the Master of the Brig must be held answerable for their value.

I do not consider the claim for freight admissible under the state of the case as shown by the Bill of lading and Protest, which are the only papers before me, and are herewith returned.

With much respect, etc.

(Signed) ALBION K. PARRIS.

[COPY]

ENCLOSURE NO. 6

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY,
VOLUME 12, PAGE 37-38

JULY 10, 1847.

To Maj. Genl. JESUP, *A. M. Genl.*

SIR; I have examined the papers submitted to me from your office on the 7th instant in support of the claim of the owners of the Schooner *William Ryan*, for freight and a quantity of govt. Stores shipped in said schooner on the 22th of January 1847, at Brazos Santiago for Tampico, and also for general average contribution on account of the jettison of a part of the cargo of said schooner on the voyage from New Orleans to Brazos Santiago, on the 24th of November 1846.

In regard to the latter claim for average, I am satisfied that, if the facts relating to the jettison are correctly stated, in the protest, the part of the cargo thrown overboard was sacrificed as the price of safety of the vessel and the residue of the cargo, and that they are liable in law to contribute to repair the loss.

It appears, by papers in the case, that the Nashville Insurance Company have insurance on the schooner, and the St. Louis Insurance Company have insurance, on her freight list, and that they, through their agencies at New Orleans, have severally paid the contributions apportioned to their offices respectively, agreeably to the adjustment of A. Brothers Insurance Brokers, or adjuster, at New Orleans.

I have examined that adjustment, and perceive no cause to doubt that it is stated according to

law, and the usage and customs of the port of New Orleans.

In regard to the claim for freight, it appears by the bill of lading, that a quantity of oats, lumber and coal, was shipped in said schooner by Qrth. Mst. Hill, on the 22 of Jan. 1847, at Brazos Santiago to be transferred to Tampico & delivered to Q. M. Babitt at that port.

It appears by the certificate of Capt. Babitt on the back of the bill of lading, that only a part of the cargo shipped, was delivered, and a portion of that delivered was damaged. Capt. Babitt adds to his certificate these words "The remainder of the cargo said by the master to have been delivered at the Brazos."

Of that, no proof is offered to me. The mere declaration of the master, of the delivery of the cargo, is not legal evidence, especially where the delivered is alleged to have been at a place different from that required by his own stipulation in the Bill of Lading, and yet more especially when he asserts, as in this case, that the delivery was at the very port of shipment.

Before the claim for freight can be admitted, it must be made to appear, that the contract has been fulfilled on the part of the owners, that is, that the goods shipped have been delivered to Capt. Babbitt at Tampico in like good order and condition as when shipped; or injured by the perils of the sea, or as expressed in the Bill of Lading, "by the dangers of the navigation."

My opinion, thus expressed on the two questions, submitted is predicated on the facts as they appear in the papers. As they have been sent to me from the Q. M. Dept. without com-

ment, I must infer that nothing is thence known calculated to weaken or impair their effect. They are herewith all returned.

Respectfully etc.

(S) ALBION K. PARRIS.

[COPY]

ENCLOSURE NO. 7

DECISIONS OF SECOND COMPTROLLER OF THE
TREASURY, VOLUME 12, PAGE 124

Nov. 3, 1847.

Maj. Genl. JESUP, *Qr. Mr. Genl.*

SIR: I have examined the papers transmitted to your office by *Capt. Jordan*, Asst. Qr. Mr., and referred to me by your letter of the 26th ulto.

As the contract for transporting the troops was made by Qr. Mr. Smith with D. B. Miller, I am of the opinion that you cannot safely make payment for the transportation to any other person, unless it be by Miller's order, and not to him, until you have satisfactory proof that *his contract with Smith has been fully performed*. I do not consider Smith's certificate of that fact indispensable. Any other proof, satisfactory to you, showing that the contract has been complied with on the part of Miller, would be sufficient.

In regard to the demurrage, if, as you state, the owner of the Boat claims of Miller but one day's demurrage, it is to be inferred that She was detained but one day, under circumstances to entitle her to demurrage.

I do not perceive anything in Capt. Jordan's letter that requires a more extended reply.

All the papers are herewith returned.

I am, etc.,

ALBION K. PARRIS.

[COPY]

ENCLOSURE NO. 8

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 12, PAGE 177

FEB. 9, 1848.

Maj. Genl. JESUP, *Qr. Mr. Genl.*

SIR: I have examined the claim of Benj. a B. Cook, for service of the Schr. *Elizabeth*, as requested by your letter of the 29th ulto. Having occasion for a more full statement of the case. I applied to Col. Hunt, who on the 5th inst. furnished the information desired.

It appears, that on the 8th of July last, the Master of the Schooner *Elizabeth*, as agent for the owner, contracted with an officer of the *Qr. Mr. Depart.* to transport in said schooner, from Fort Pickins in the harbor of Pensacola, to New Orleans, the officers and men and baggage of Compy. G. 1 Artillery, for which service the Master of the schooner was to receive *three hundred dollars*. It further appears, by an endorsement on the contract, that, in the prosecution of the voyage, the Schr. was wrecked on the north end of Chandelier Island, from which place the Company was transported to New Orelans by another vessel, under a contract made by an officer

in behalf of the United States, at an expense of *two hundred dollars.*

Col. Hunt reports to me that when the *Elizabeth* was wrecked, she had "performed about one fourth or one third of the distance between Fort Pickens and New Orleans."

The legal right of the owners of the *Schr.* to a pro rata freight, depends upon whether the further transporting the troops was intentionally dispensed with on the part of the United States. It is well settled law, that when a ship, by inevitable necessity, is forced into a port short of her destination, and is unable to prosecute the voyage, and the goods shipped are there voluntarily accepted by the owner, a pro rata freight is due.

The evidence upon this point is not full, but unless the Qr. Mr. Department has information that the fulfilment of the contract was insisted on by the officer in charge of the troops, I think it may be inferred, from what appears in the case, that it was dispensed with, and, consequently, the claim to a pro rata freight, is valid.

All the papers are herewith returned.

I am, very respectfully Yours,

(s) ALBION K. PARRIS.

ENCLOSURE NO. —

DECISIONS OF SECOND COMPTROLLER OF THE
TREASURY, VOLUME 12, PAGE 234

MAY 3, 1848.

Maj. Gen. JESUP, Qr. Mr. Genl.

SIR: In my opinion of the 9th of February last on the claim of the owners of the Schooner *Elizabeth*, I state that the legal right of the

owners of the schooner to a pro rata freight depends upon whether the farther transporting the troops was intentionally dispensed with on the part of the United States. By the statement of Capt. Winder transmitted with your letter of the 2nd. inst. it appears, that no efforts were made on the part of the owners of the schooner to procure transportation for the troops after she was wrecked, and that the transportation was procured from necessity by Capt. Winder. Under this statement of facts I do not consider owners of the *Elizabeth* entitled to any freight.

The papers are herewith returned.

I am etc.,

ALBION K. PARRIS.

[COPY]

ENCLOSURE NO. 9

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY,
VOLUME 12, PAGE 235

MAY 3, 1848.

Maj. Genl. JESUP, *Qr. Mr. Genl.*

SIR: I have received yours of the 29th ulto. in which you request to be informed whether the United States is liable for the freight of sundry horses that perished on the passage from New Orleans to Vera Cruz, during a severe storm.

It appears by the papers received with your letter, that on the 19th of October last the U. States Quarter Mr. stationed at New Orleans shipped on board the Bark *Rothschild* then lying at that port and bound for Vera Cruz in Mexico, seventy-four public horses, which the master of the said Bark agreed to deliver to the U. States Qr. Mr.

at Vera Cruz (the dangers of the navigation only excepted) for freight at the rate of fifteen dollars for each horse.

By an endorsement on the Bill of lading, it is certified that fifty-two of the horses were thrown overboard in a gale of wind, and in the Protest of the Master and others it is stated that said fifty-two horses died from the violence of the gale and were thrown overboard. On this statement of facts, I am clearly of opinion that freight for the horses lost cannot be legally claimed of the United States. The law upon this point is well settled, in proof of which I might refer to many authorities. I will merely mention the case of *Griggs vs Austin*, 3 Pickering's Massachusetts Reports, p. 20, where goods shipped at Boston for Liverpool were lost, by the perils of the sea, within six miles of the latter port. The Court decided that the freight having been paid in advance, might be recovered back by the shipper. That case was argued by eminent counsel, and the opinion of the court reviews the authorities and puts the question at rest.

The papers are returned herewith.

I am, etc.,

ALBION K. PARRIS.

(Attachment for decision of May 3, 1848,
volume 12, page 235)

Nathaniel Griggs et. al. v. Samuel Austin, et. al., (1825) 4 Pickering's (Mass.) 20. Action in *indebitatus assumpsit* for money had and received.

In November 1822, plaintiff shipped 904 barrels of Apples from Boston to Liverpool on

board the Ship *Topaz*; freight was paid in advance to defendants, owners of the ship for the intended voyage; ship was stranded at Crosby, six miles below the port of Liverpool and apples lost due to the damage by salt water. The bill of lading provided for delivery in like good order and well conditioned at the port of Liverpool, the dangers of the sea only excepted.

Held by court that ship owner was not answerable for the value of the cargo lost due to dangers of the sea or mishaps of navigation not due to negligence of master or crew or lack of seaworthiness of vessel, but that freight is the compensation for the carriage of the goods, and if it be paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it is to be repaid unless there be a special agreement to the contrary.

Judgment for plaintiff.

Cases cited by counsel and court to support holdings: *Lane v. Pennimon & Tr.*, 4 Mass R. 91; *Mashiter v. Buller*, 1 Campb. 84; *Howland v. The Brig Lavinia*, 1 Peter's Adm. Rep. 126; *Sampson v. Bull*, 4 Dallas 459; *Giles, et. al. v. The Cynthia*, 1 Peter's Adm. 203 (1801) (Fed. Cases #5,424).

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY,
VOLUME 12, PAGE 246

MAY 22, 1848.

Maj. Genl. JESUP, *Q. M. Genl.*

SIR: I have received yours of the 16th inst, inclosing additional testimony in the case of the Rothschild,

I still adhere to my opinion of the 3rd inst. in this case, that no freight is due on the horses thrown overboard *in the gale*, as certified by the Q. M.'s endorsement on the back of the Bill of Lading. It is now testified by the Master that "of the whole number of Seventy-four horses taken on board at New Orleans, only twenty-two remained alive at the time of our arrival at Vera Cruz. At the time of our arrival twenty-one of the horses were on deck, dead, the others had been thrown overboard before our arrival." The Captain adds "I went on shore immediately after our arrival at Vera Cruz and reported to Capt. Elliott, United States Quarter M. notifying him of the horses that were in good order on board, and of those that lay dead on deck. He ordered me to land the live ones, and to throw the dead ones overboard, which I accordingly did."

It had been repeatedly decided by Courts of the highest authority in the United States, that "Where goods arrive at the port of destination in so damaged a state as to be of no value, the owner of them is not at liberty to abandon them for the freight, but the ship owner is entitled to recover full freight for the voyage." I think you may allow freight on those horses that were thrown overboard in the harbor of Vera Cruz by order of the consignee, the vessel having arrived at her port of destination, and the horses on board at the time of her arrival having been disposed of agreeably to the direction of the Quarter Master to whom they were consigned.

The papers are herewith returned.

I am, etc.

(S) ALBION K. PARRIS.

ENCLOSURE NO. 10

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY,
VOLUME 13, PAGE 188

Nov. 17, 1849.

Maj. Genl. JESUP, *Q. M. Genl.*

SIR: I have examined the papers in the case of the claim of the owners of the Steamer *Mary Kingsland*, referred to me with your letter of the 13th instant.

On the 18th of August, the owner of the aforesaid Steamer agreed to charter her at New Orleans to the United States' Quarter Master's Department for a voyage to Fort Brooke, Tampa Bay, in Florida and agreed to transport in her such number of United States' horses, mules and Stores, and persons in the public service, as Col. Hunt, Deputy Quarter Master General, should think proper to send on board. In consideration whereof, when performed to the satisfaction of the officer of said Department at Fort Brooke, the owner of the steamer agreed to receive, in New Orleans, four thousand five hundred dollars.

On the 21st August, the steamer was reported to Col. Hunt as ready to receive cargo, and thereupon a large number of horses and mules, and wagons, and forage, and other Quarter Master's Stores, were shipped on board, for which the agent of the steamer signed bills of lading in the usual form.

It appears by an endorsement on the charter party that on the night of the 27th of August, the "Steamer burst one of her boilers either killing or scalding most, if not all, the horses and mules. They were all thrown overboard together

with all the hay and oats which were on deck, and part of the waggons and other Quartermaster's property." At the request of the Master of the *Mary Kingsland*, the Quarter Master at Fort Brooke sent the U. S. steamer *Col. Clay* to bring the disabled steamer to her anchorage, where "she was unloaded and discharged."

The owners claim the full freight stipulated in the charter party.

In an opinion given by me on the 18th May, 1846, on the claim of the owners of the Steamer *Magnet*, I had occasion to state the law applicable to a case somewhat similar to the one now before me. It seems to be settled law, that if a ship be chartered at a specific sum for the voyage, and she loses part of her cargo by a peril of the sea, and conveys the residue, no freight can be claimed under the charter party. Such a contract of affreightment being considered an entire contract, unless fully performed by a delivery of the whole cargo, no freight is due under it, the delivery of the whole cargo in such a case being a condition precedent to the recovery of freight. This doctrine is fully recognized by Chancellor Kent, 3 Commentaries, 227, 3 edition; and by Abbot on Shipping, 5 Amer. edition, 524.

In the case of the *Magnet*, above-referred to, I gave an opinion, that nothing could be allowed as freight in any form, inasmuch as no part of the cargo was delivered.

In the present case, a part was delivered, and although, as above stated, nothing can be claimed

under the charter party, yet, in the language of Abbot, above cited, "it seems hard that the owners should lose the whole benefit of the voyage, where the object of it has been in part performed, and no blame is imputable to them.

In a case before the supreme Court of New York, 1 Johnson's Rep. 24, the court held that where the ship is chartered for a specific sum for the voyage, the general rule is, that if a part of the cargo is lost by the perils of the sea, and a part conveyed to the port of destination, there can be no apportionment of freight *under the charter party*. A majority of the court, however, inclined to the opinion, that there might, in another form of action, be a recovery of freight, in proportion to the amount of the goods delivered. In the present case, I am inclined to adopt the above suggestions, as thereby equitable relief will be afforded to the owners of the steamer, and as such a course will better comport with the character of the government than to shield itself under the strict law applicable to the charter party.

If you shall be satisfied that there is no blame imputable to the owners, either on account of defects in the steamer, or on any other account, connected with the loss of the public property, I think you may, in this case, allow freight in proportion to the goods delivered.

The papers are herewith returned.

I am, very respectfully, Yours

ALBION K. PARRIS.

[COPY]

ENCLOSURE NO. 11

DECISIONS OF THE SECOND COMPTROLLER OF THE
TREASURY, VOLUME 18, PAGE 44, 45

FEBRUARY 16, 1855.

Major D. H. VINTON,

Qr. Mr., U. S. A., St. Louis, Mo.

SIR: Your letter of the 1st instant in relation to payment for certain *army supplies* consumed by a contractor for their transportation, who is not named, was received this morning.

You state that the contractor is willing to pay for the supplies which were used for the maintenance of himself and his teamsters, on the route from Fort Leavenworth to El Paso, and you wish to know whether the prices shall be computed at the place of departure or the place of delivery.

I regret that you did not send me a copy of the contract, or if it be filed here that you did not indicate it, so that it might be seen whether or not there were any stipulations in regard to part delivery; as under a general contract to deliver specified articles and quantities, no recovery could be had for part performance. Assuming however, that the supplies which reached El Paso, were duly accepted, and the right of the contractor to receive payment for their transportation admitted, on strict legal principles the contractors would be liable to make good, at the place of delivery, the deficiency in the supplies he had bound himself to deliver—the United States allowing upon such replaced supplies, the contract rate of transportation. But when supplies

are consumed from necessity, or lost by unavoidable accident, *en route* to the place of delivery, it has been the practice of the Government, heretofore, to debit the contractor only with the price at the place of departure, disallowing, of course, any charge for the transportation of the supplies so lost or consumed. This practice is equitable, and as I see no reason why it should be interrupted, the accounts of contractors in such cases may be adjusted in conformity with it.

I am, etc.

(S) I. M. B.

ENCLOSURE NO. 12

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY,
VOLUME 18, PAGE 312

JUNE 25, 1855.

Maj. Genl. THOS. S. JESUP,

Quarter Master Genl.

SIR: The papers connected with the freight claim of owners of Steam Ship *Louisiana*, which were transmitted with your letter of the 23d instant, are herewith returned.

It seems that a part of the stores (oats) shipped by the United States were lost and part delivered in a damaged state to the consignee. The owners propose to pay the cost of the lost articles, 362 bags of oats, on condition that the stipulated freight per bushel be paid on the remainder.

It is in proof that the loss and damage were caused by the perils of the seas, without fault on the part of the master or crew.

Under such circumstances, in case of a general ship, or a ship chartered for freight to be paid according to the quantity of goods shipped, freight is due for so much as may be delivered even if damaged, when the rest has been lost by a peril of the sea; more especially if the agent of the freighter has received the goods, as in that case the damaged can not be set up as a defence to an action for freight.

I should recommend therefore that, in this case, the proposition of the owners be accepted.

I am, etc.

(S) J. M. B.

[COPY]

ENCLOSURE NO. 13

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 19, PAGE 183, 184

Claim of John S. Wright, for passage money etc. Steamship *America*—burnt before she reached her destination.

Endorsed on Auditors Report:

I concur in the reasoning and conclusions to which the Auditor has arrived, and, after a careful examination of all the documents I affirm his decision.

Passage money and freight are governed by the same rules as between the passenger or freighter and the Ship owner or master.

The contract for conveyance of persons or goods is in its nature and entire contract, and unless it be completely performed by delivery at the place of destination, the passenger freighter

or consignee will not be subject to any payment whatever. The best authorities hold this doctrine, on the very reasonable ground that the freighters etc. would not in general derive any benefit from the time and labor expended in a partial conveyance. The cases in which partial payments may be claimed are exceptions.

Judge Story held that in cases even where freight had been paid in advance the owner could not retain it without an express stipulation to the purpose, but that the shipper would be entitled to recover it back, (3 Sumner 66.) Much less could a claim for freight or passage be sustained when payment was to be made on the delivery of the goods or persons at a place which the vessel never reached. In that case a condition precedent remains unfulfilled.

In this case the claimant made an absolute contract with the United States which in consequence of a calamity, for which neither party is to blame, remains unfulfilled on his part. He is a sufferer and so is the government, by his inability to perform what he had bound himself to do. It is true that it appears that the claimant proffered conveyance, after the burning of the *America*, on a vessel which was not accepted by the Agent of the government, and which no legal obligation required him to accept. The proposal therefore cannot be held to be a legal performance of the contract, or to affect the rights of the parties as they previously stood under it.

2d Comp. Office, January 12, 1856.

J. M. BRODHEAD, *Comptroller*.

ENCLOSURE NO. 14

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY,
VOLUME 19, PAGE 215

FEBRUARY 11, 1856.

Gen: J. G. TOTTEN,
Engineer Department.

SIR: Your letter of the 9th instant in regard to the rule requiring accounts for freight to be accompanied by bills of lading, was received this morning.

This rule was designed to apply only in cases where according to custom bills of lading are given in the ordinary course of business, as in shipments from one port to another, and was not intended to create a necessity for vouchers not generally obtained.

For transportation of public supplies and materials on rail roads etc., a properly receipted bill for the service, with the certificate of the proper officer that the articles were delivered would be sufficient in that respect, as it is not customary for bills of lading to be given for freight upon rail roads.

The vouchers in Capt. Meig's account, referred to by you, are understood to be admissible under this explanation of the rule, which is equally applicable to the accounts of other officers.

I am etc.

(Signed) J. M. BRODHEAD.

[COPY]

ENCLOSURE NO. 15

DECISIONS OF SECOND COMPTROLLER OF THE
TREASURY, VOLUME 20, PAGE 166

APRIL 1, 1857.

Maj: Genl. THOS S. JESUP,

Quarter Master General.

SIR: Your letter of the 28th ulto in regard to the claim for freight of *Messrs. Sanford & Bros.*, Agents for Steamer *Mons Greenwood*, was received yesterday with the papers in the case.

Upon an examination of all the documents, I am satisfied that the sum claimed (\$894.87) was rightfully withheld from the freight, and that as between individuals the owners could not have enforced by law payment even of the sum they received; for the contract of affreightment is not fulfilled on the part of owners until the shipped goods have been delivered by them at the place of destination. It is usual, however, when a ship is forced by necessity into a port short of her destination, and the goods are accepted by the consignee, or some person authorized to accept them, to allow freight *pro rata itineris practi-* for the portion of the voyage performed. That has been done substantially in this case, and your decision rejecting the claim for more, is in my opinion correct. All the papers are herewith returned.

I am, etc.

J. M. B.

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY,
VOLUME 28, PAGES 134-135

JULY 8, 1865.

SIR: I return the papers in the case of the owners of the Barque *Whistling Wind*.

It appears that this vessel while on a voyage from New York to New Orleans was captured by a rebel privateer called the *Coquette* and commanded by one Read, a deserter from the U. S. Navy.

The value of the vessel was appraised at \$14,500.00, and the war risk to this amount was assumed by the United States.

The guaranty is as follows: "The United States Government assumes the war risk on the passage of the vessel out to New Orleans, and until discharge, the valuation being fourteen thousand five hundred dollars \$14,500.00.

The owners have already been paid the above sum on account of the loss of their vessel. They now claim the freight amounting to \$4,075 and ship's expenses \$1,869.10.

The United States not having assumed any risk whatever in respect of the freight, are not in the position of insurer, no claim can, therefore, be maintained against the Government as an insurer. But if it be admitted that the United States was insurer for the freight, as well as the ship, it does not avail anything.

The agent of the Gov't by an express contract agreed that the total liability to be assumed should not exceed \$14,500.00. He has paid over to the owners of the Barque this amount, and the contract on the part of the United States has been fulfilled and completed. But if the

United States had not fixed their liability in the promises, they would still be held not responsible. The authorities are all agreed that when the loss of the vessel is occasioned by perils of the seas, fire, enemies, pirates etc., there is also a loss of freight Vide Phillips, insurance Vol. 2 p. 353. 354; Parsons War Law vol. 2 p. 385, 391. This principle is also laid down in the case of *Blanchard v. Buckman*, 3 Green-leaf 1. Vide Abbotts Shipping, p. 470, Note 1; p. 405, Note 1. In regard to the claim for ships expenses of 1,869.10 it is not perceived how they can be connected with the freight, thus the clearance fee, advances to crew, pilot, towage, ballast, stores, stevedore, water, provisions, Captain's wages, Marine insurance, chronometer, charts etc., are regarded as legitimate expenses of the ship and not of the cargo and freight.

A portion of these expenses is looked upon as essential to the sea worthiness of the vessel, and a neglect to provide the vessel with sufficient water, provisions & stores for the officers and crew, or shronometer, maps, charts, & pilot, for the safe navigation of the vessel, would bar the right of recovery of insurance in case the vessel was lost.

The United States agreed to pay to the owner of the *Whistling Wind* at the rate of \$9.50 per ton, for the carriage of 450 tons of coal from the Port of New York to New Orleans; that the vessel should be seaworthy, and that she should deliver her cargo, are conditions precedent to the payment of freight. *Prima facie* the vessel was seaworthy, but having been captured by a rebel pirate, and in consequence having been prevented

from earning the freight, she is not entitled to any compensation, the papers are herewith returned.

(S) J. M. BRODHEAD, *Comptroller*.

S. V. NILES, Esq., *Washington, D. C.*

Marginal reference 134, 581 not pertinent.

[COPY]

ENCLOSURE NO. 17

DECISIONS OF SECOND COMPTROLLER OF THE TREASURY, VOLUME 33, PAGES 72-73

MARCH 31, 1870.

SIR: I have received the papers in relation to the payment of freight on certain goods belonging to the United States, shipped by Brevet Maj. Gen. Rufus Ingalls, Asst. Q. M. Gen. New York City, to Brevet Col. Henry C. Hodges, Q. M. U. S. A. Philadelphia, per Steamer *Eutaw*, Dec. 12, 1869, the freight on which was fixed, in the Bill of Lading, at Twenty-one dollars. (\$21.)

This case was referred to me from your office, for information "whether the full amount of freight money may be paid to the owners of the steamer *Eutaw*"? It appears from the report of the Board of Survey, that it was in evidence before them, that the steamer was stranded and lost, on her way to her port of destination. That a portion of her cargo was saved by wreckers. A Board of Survey was appointed to assemble, Jan. 24, 1870, at the Schuylkill Arsenal, Philadelphia, "to determine and fix the responsibility for damage and deficiency of supplies invoiced by Bvt. Lt. Col. Wm. B. Beck 1st. Lt. 5th. U. S.

Artillery, Acting Asst. Qr. Mr. Fort Adams, Rhode Island, to Capt. Wm. H. Gill, Military Storekeeper, Qr. Mr. Dept. U. S. A." Upon examining the evidence in the case, the Board found, "that the disaster to the vessel was not attributable to any neglect of duty, or want of vigilance, or proper care on the part of the officers or crew of said steamer."

There is no evidence with the papers to show whether the property shipped by the United States, was delivered at Philadelphia; but it is presumed it was, otherwise a Board of Survey would have had nothing to consider. If the property shipped, or a portion of it, was delivered in conformity with the terms of the agreement, notwithstanding it may have been damaged by the perils of the sea, if so damaged, as appears by the finding of the Board of Survey, without fault or neglect of the officers or crew of the Steamer, the freight, on all that was delivered was earned, and should be paid. See Second Comptroller's Digest. Title, "Freight".

If the property was not delivered, no freight can be paid; it being a well settled rule, that no claim for freight can be admitted until there is evidence of the delivery of the goods. If the Quartermaster General finds that the goods, or a portion of them, shipped, were delivered at Philadelphia, even though injured, the finding of the Board of Survey, as above stated, will justify the payment of the sum fixed in the Bill of Lading, if all were delivered; or a *pro rata* amount on such as may have been delivered, if not all.

But unless actually delivered, the freight cannot be paid.

J. M. BRODHEAD, *Comptroller.*

Maj. Gen. M. C. MEIGS, *Qr. Mr. General.*

[COPY]

ENCLOSURE NO. 18

DECISIONS OF SECOND COMPTROLLER OF THE
TREASURY, VOLUME 24, PAGES 666, 667, 668

TREASURY DEPARTMENT,

2D COMPTROLLER OFFICE,

Feb. 14th, 1863.

SIR: Your letter of Nov. 18th, 1862, relating to claim of Brig *East* was duly received and considered.

It is claimed that the Brig took Government freight on Bill Lading of date New York Feb. 20th, 1862, for Fort Pickens, verbally contracted to tray \$2,500, noted in Bill Lading, and eight fair working days to discharge & \$37.12 demurrage for each day detained thereafter. That Brig reported off Ft. Pickens 19th March and commenced unloading as soon as practicable. That on the 3d April Quarter Master had received all of the cargo except 1,000 shells—227 Bbls Beef, and 17 Bbls Pork, when he quit & commenced unloading the steamer Philadelphia part of whose cargo he put in the Brig. That on the 5th April it commenced storming so hard that goods could not be landed," and the Brig was finally wrecked with goods on board.

The receipt of the Quarter Master at Ft. Pickens for all cargo except 1,000 shells, 227 Bbls Beef & 17 Bbls pork appears on the Bill Lading,

also his certificate that Brig is entitled to nine days demurrage. There also appears Certificate of Quarter Master of date April 23rd, 1862, countersigned by Commanding General, setting forth facts detailed above regarding arrival, unloading & wrecking of the Brig, except it states that all her cargo was landed "except 1,000 shells, 230 bbls beef & 19 Bbls pork" thus making a discrepancy between it and the receipt of 3 bbls beef and 2 bbls pork.

On this state of the case the Brig claims full freight & 9 days demurrage. Without passing upon the sufficiency of the proof in regard to the contract for freight and demurrage which appears to be noted in the Bill of Lading produced & which is signed only by the Master of the Brig, I will pass to the consideration of the points presented by the case.

If it be admitted that the Brig arrived at the place (near the dock or beach) where she was to unload on the 19th March, and waiting the time specified for discharge, delivered her cargo, except a small balance and was in good faith ready & able to deliver the balance, but was prevented by the acts of the Quarter Master, who also on authority of Commanding General, put other goods on board of her as stated, it is my opinion that the transaction amounted to a delivery and acceptance of the goods on board, & that the Brig was entitled to full freight.

But there is a question whether further proof is not also required to show that the goods not actually received by the Quarter Master, were still on board, and were in fact, so constructively delivered. It will be perceived that the Quarter-

master receipt of all "except 1000 shells, 227 Bbls beef, & 17 Bbls pork" does not establish the fact, that those goods still remained on board.

Besides—although the Brig was wrecked, it nowhere appears that the balance of the cargo was lost.

In regard to the claim for demurrage, certificates of Quarter Master in regard to demurrage and damage, if taken as advisory evidence, should at least be confined to a clear and explicit statement of facts and not conclusions.

If it be assumed that the Brig arrived at the place (wharf or beach) on the 19th March, when it stated she reported "off Ft. Pickens" and that ten lay days commenced to run from then, it would seem that Government had until the 29th to receive the cargo—excluding Sunday.

Commencing then with the 29th, and give to and including the 4th April as demurrage, the weather from & including the 5th being too stormy to unload, and it would give but seven instead of *nine* days for demurrage. This may be correct or not, according to the *facts* which are not made fully to appear. In order to decide the amount of demurrage, if any, it would be well to have proof of the time she actually came up to the place of unloading, the state of the weather, the readiness and ability of the Brig to discharge—whether she contributed in any manner to the delay or whether she consented to it with a view to the demurrage etc.

For these reasons I return the papers that further may be supplied on the points designated.

Very respectfully etc.,

(S) J. MADISON CUTTS, *Comptr.*

Brig Genl. M. C. MEIGS, *Quarter Master Genl.*

[COPY]

ENCLOSURE NO. 19

TREASURY DEPARTMENT,

OFFICE OF THE SECOND COMPTROLLER,

Washington, D. C., June 27, 1893.

Hon. DANIEL S. LAMONT,

Secretary of War.

SIR: I have the honor to acknowledge the receipt, by reference from your Department, of the letter addressed to you by the Quartermaster-General June 15, 1893, requesting the submission, for my decision, of three questions relating to the rendition of public accounts.

The three questions are as follows:

First: Under the decision published in General Orders No. 32, A. G. O., 1893, are bills for the various articles of quartermaster supplies which are purchased and delivered under formal written contracts, required to be attached to the vouchers?

Second: Under the decision, are bills for services under formal written contracts required to be filed with the vouchers?

Third: Under the decision, are bills for transportation service performed under public tariffs,

and for telegraphic service where the rates are fixed by the Postmaster-General, required to be filed with the vouchers?

My decision upon the first and second questions is that the vouchers referred to in said decision which are filed in support of payments under formal written contracts, need not be accompanied by bills, in cases where the quantities delivered or the amounts due are determined by duly authorized inspectors and their certificates as to the facts determined are filed with the vouchers to which they pertain.

My decision upon the third question is that the vouchers referred to in said decision which are filed in support of payments for transportation service performed under public tariffs, need not be accompanied by bills, in cases where duly accomplished bills of lading or transportation requests, as the case may be, are filed with the vouchers to which they pertain, and that all vouchers referred to in said decision which are filed in support of payments for telegraphic service where the rates are fixed by the Postmaster-General, need not be accompanied by bills other than those required independently of said decision.

I have the honor to be, Very respectfully,

(S) C. H. MANSUR,
Second Comptroller.

[COPY]

ENCLOSURE NO. 20

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE TREASURY,

Washington, March 6, 1901.

The Honorable,

The SECRETARY OF WAR.

SIR: By your direction I have received a letter, dated February 23, 1901, addressed to the Quartermaster General by A. S. Kimball, Assistant Quartermaster General, in which the latter submits the question as to whether the Quartermaster's Department is authorized to make prepayment of freight charges on shipments for and on behalf of the United States where the regulations of the carriers require such prepayment.

It appears in said letter that because of the manner in which the business has to be done, through a third party, the cost of the freight exceeds what it would be if the same could be prepaid.

Under date of March 1, the Quartermaster General requests—

information whether under the decision of November 11, 1896 (3 Comp. Dec. 181), officers of the Quartermaster's Department may pay freight charges on shipments made by them by rail or water *in advance of delivery at destination* in order to secure *cheaper rates* for such shipments. If the decision is not applicable to shipments by

officers of the Quartermaster's Department, it is not the object of this communication to request that payments of freight charges *in advance be sanctioned*, as it will materially interfere with the accountability of officers for stores lost or damaged in transit, for which the carriers are now held rigidly responsible.

In the decision of November 11, 1896, *supra*, it was said, quoting from the syllabus:

A disbursing officer will be allowed credit for freight charges prepaid upon shipments to a foreign country, without furnishing proof of delivery of the goods at destination, when he supports his voucher therefor with the bill of lading issued by the carrier and his certificate, or other evidence, that prepayment was necessary to secure the transportation.

In section 876, Digest of Decisions of the Second Comptroller, Vol. 1, it is said:

No claim for freight can be admitted until it shall be made to appear that the contract has been fulfilled on the part of the owners; that is, until the goods have been delivered in good order and condition as when shipped, or injured by the perils of the sea.

On March 29, 1898 (4 Comp. Dec., 544), the Comptroller, having before him a question submitted by the Secretary of the Treasury in regard to the prepayment of express charges, after quoting section 3648, Revised Statutes, said, quoting from the syllabus:

The prepayment to an express company of charges for transportation is prohibited

by section 3648, Revised Statutes, which provides that "no advance of public money shall be made in any case whatever, and in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the services rendered or of the articles delivered previously to such payment."

While this later decision does not in express terms overrule the decision of the Assistant Comptroller of November 11, 1896, *supra*, it does overrule it in fact, and adds at the close of the decision the following:

The rules or customs of railroad, express, or other private companies, however reasonable, can not supersede an express provision of a statute, and if those companies decline to render service except upon such terms the inconvenience must be borne until the statute is modified or repealed.

The subject was again considered in 7 Comp. Dec., 262, and it was therein held, quoting from the syllabus:

Payment in August, 1900, for magazines to be delivered monthly during the fiscal year 1901, is prohibited by section 3648, Revised Statutes, which provides that no advance of public money shall be made in any case whatever.

In conclusion I will add that so long as the provisions of section 3648, Revised Statutes, stand

unrepealed, I see no way in which prepayment of freight charges can be authorized.

The enclosures are herewith returned.

Respectfully yours,

(S) L. P. MITCHELL,
Assistant Comptroller.

[COPY]

Appeal No. 8184:

ENCLOSURE NO. 21

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE TREASURY,

December 12, 1902.

The Pacific Mail Steamship Company applied, November 20, 1902, for a rehearing on a claim disallowed by the Auditor for the War Department in settlement No. 16957, dated September 25, 1901, said action being affirmed by this office, September 23, 1902.

The company claimed \$154.95 as refundment of the value of commissary stores found short on delivery of invoice of stores shipped from San Francisco, Cal., June 30, 1899, by steamship *Rio de Janeiro* billed through to Manila, P. I., on Voyage #75, and freight thereon \$12.46, amounting in all to \$167.41; it appears that the value of the stores was charged to and paid by the company in order to secure payment for the services rendered and that the freight charges thereon were deducted by the Depot Quartermaster at San Francisco, in making settlement of the transportation charges. (See voucher #3, Abstract B, Money accounts of Captain O. F.

Long, Quartermaster, U. S. Army, for September 1900, fiscal year 1900.)

Said claim was disallowed by the Auditor whose action was affirmed by this office as above stated. The company now asks a reconsideration by this office and an allowance of the amount heretofore disallowed.

It appears by affidavits that the stores received by the steamship *Rio de Janeiro*, Voyage #75, consigned to the United States Depot Quartermaster at Manila, consisted of 7,500 packages, which were all delivered to the steamship *Yuensang*, of the Indo-China Steam Navigation Company at Hong Kong, to be forwarded to Manila; the master of the steamship *Yuensang* makes affidavit October 12, 1901, that all of said 7,500 packages were taken delivery of at Manila at ship's tackles and that receipts showing complete and sound delivery were obtained; and that said receipts have since gone astray and cannot be found. Messrs. Jardine, Matheson & Co., General Managers of the Indo-China Steam Navigation Co., states that said receipts on examination by them proved complete and sound delivery.

The agent of the Pacific Mail Steamship Company at Hong Kong, under date of January 1, 1901, states that he had inspected the said receipts which consist of the delivery order books and that the cargo is signed for by the men in charge of the Government lighters, they being in all cases Spaniards. He further states that these receipts show that the full number of packages were delivered to the lighters in good order and condition.

It appears to have been the custom at that time for freight to be so received; on checking the

freight in the Government warehouse, the shortage was discovered; the company claims that the loss occurred between the delivery to the lightermen and the Government warehouse, and that delivery having been made in full to said lightermen in the employ of the United States, the said loss should not be charged to the transportation company.

The claimant company, by its Vice President and General Manager under date of November 14, 1902, states that it did not receive information of the shortage in time to submit proofs of complete delivery at ship's tackles to the Board of Survey which held them responsible for the said loss. He further states:

The first intimation received at the General Offices of the Pacific Mail S. S. Co. that the Government check had developed a shortage in this consignment per *Rio* was when the Government bill of lading was received in San Francisco on November 1, 1899, per S. S. *China*. Even then we were not aware that a Board of Survey had been held to fix the responsibility for the shortage and had decided that the Pacific Mail S. S. Co. was to be held responsible for same. On November 2, 1899, the day following the receipt of the certified copy of Government bill of lading we rendered bill to Col. Long, the Depot Quartermaster at San Francisco, for the full amount of freight charges on shipment per *Rio* Voy. 75, amounting to \$5,246.75. As the bill was still unpaid in February, 1900, the matter was taken up with Col. Long to ascertain the cause of the delay and he informed us on February 10, 1900, the delay in settlement was caused owing to the fact that

report of the Board of Survey which acted in relation to this shortage was missing from his files. It was not until some time in May, 1900, as I remember now, that we were officially advised we were to be held responsible for the shortage developed by the Government check and our records show that on May 21, 1900, the Pacific Mail S. S. Co. paid over to Col. Long the sum of \$154.95, this being the value of the Government stores for the loss of which, we were informed, the Board of Survey had held we were responsible. In paying this sum we did so not because we acknowledged our responsibility for the shortage which was found to exist after the consignment had reached the Government store houses at Manila, but that we might not be longer kept out of \$5,246.75 freight money earned on the shipment in question, some eight months previous, the freight having been delivered in Manila about September 1, 1899. However, even after paying the amount claimed by the Government we were unable to collect our money and it was not until September 15, 1900, that the Government paid our bill after deducting therefrom a further sum of \$12.46, the freight on the stores claimed to have been short. Therefore over a year elapsed between the time the freight was delivered at Manila and the date on which the freight bill was paid by the Government.

The delay in obtaining information as to the action of the Board of Survey and obtaining a settlement of freight bill by the Government will in a great measure explain why so long a time elapsed between the time of the delivery of the freight and the date on which we took steps towards

obtaining a reconsideration of the action taken by the Board of Survey, which delay the Hon. Comptroller of the Treasury refers to.

In regard to the receipts obtained by the *Yuensang* from the parties in charge of the Government lighters at Manila at the time this freight was delivered to said lighters: While it is unfortunate that these receipts cannot be located and produced at the present time there can be no question raised as to their actually having been received by the *Yuensang*. These receipts were exhibited to our Agent at Hong Kong, Mr. J. S. Van Buren. (See his letter to Claim Department, P. M. S. S. Co., dated January 1, 1901, original of which you have.) Capt. P. H. Rolfe, Master of the *Yuensang*, also made affidavit before U. S. Consul General Rublee at Hong Kong on October 12, 1901, to the effect that such receipts, showing complete and sound delivery to Government representatives at ship's tackles, Manila, were obtained by him, and that these receipts were produced for the inspection of Messrs. Jardine, Matheson & Co. (the Agents of the Indo-China S. S. Co., Managing Owners of the *Yuensang*), some time in June, 1900, but had since gone astray and could not be located. (The original of this affidavit has been sent you.)

In regard to delay in our presenting the original Government bill of lading at Manila, covering the *Rio* shipment for certification, I enclose herewith original letter and enclosure from Mr. Alex. Center, General Agent Pacific Mail S. S. Co.,

dated San Francisco, October 21, 1902, #4495, which shows fully the reasons for this delay and that every effort was made by this Company to get the bill of lading to Manila and into the hands of the Government's representatives at the earliest possible date.

It appears that the Board of Survey which held the claimant company liable for the loss, relieved the steamship *Bidston Hill* from responsibility for losses from her cargo upon the sworn statement of the captain that his cargo was intact until the Quartermaster's Department began to unload his vessel.

The Board in its report stated that the nature of the transportation, necessary because no other can be obtained, between a ship in the Bay and the Government storehouses, is such that losses are unavoidable.

It seems probable that the Board would have also relieved the claimant company from the loss in question, upon the evidence now presented to this office, and which, no doubt would have been presented to said Board had opportunity been given.

Upon the new and material evidence presented the case is hereby reopened and the amount of \$167.41 heretofore disallowed is hereby allowed.

The Auditor will state an account accordingly.

(Signed) R. J. TRACEWELL,
Comptroller.

[COPY]

ENCLOSURE NO. 22

Appeal No. 17812.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE TREASURY,

October 29, 1909.

The United Fruit Company, of New Orleans, La., appealed October 4, 1909, from so much of the action of the Auditor for the Navy Department in settlement No. 9335, dated June 16, 1909, as deducted from the amount of \$150 otherwise allowed therein the following item:

On account of lost freight shipped by Adler & Co., New Orleans, La., for U. S. S. *Dubuque*, and never delivered to that ship or any other ship in the Navy, \$99.01.

Said item is subitemized by Adler & Co. as follows:

3350 lbs. Potatoes, Irish (19 bbl.)	\$67. 00
620 lbs. Onions (4 bbl.)	12. 40
Drayage	\$1. 35
Insurance	. 54
Freight	17. 72
	<hr/> 19. 01
	<hr/> \$99. 01

Paymaster Kenneth C. McIntosh, of the U. S. S. *Dubuque*, then at Puerto Cortez, Honduras, cabled Adler & Co., Inc., at New Orleans, La., October 22, 1907, as follows:

Ship *Dubuque* Portocortes - Honduras
United Fruit Steamer Thursday Twenty-fourth 3000 potatoes 400 onions.

Adler & Co., October 23, 1907, delivered to claimant 19 bbls. potatoes and 4 bbls. onions, to be transported by its steamer *Bluefields*, then

in New Orleans, to Puerto Cortez, and there delivered to the U. S. S. *Dubuque*, care of American Consul; and paid freight thereon amounting to \$17.72, the payment of freight by the shipper being required by the claimant. (See Bill of Lading, No. 844, issued by claimant October 23, 1907, acknowledging receipt of goods from Adler & Co. for delivery as aforesaid.)

The Bureau of Supplies and Accounts, Navy Department, reports, June 18, 1909, that the supplies in question were never delivered to the *Dubuque*. A Board of Survey ordered by the Commanding Officer of the *Dubuque* February 17, 1909, found that the supplies had never been received by the *Dubuque*, nor by the *Marietta* or *Paducah*, the only other United States ships in Honduran waters at the time of the arrival of the *Bluefields* at Puerto Cortez, and that the U. S. Consul at Puerto Cortez, who was also wharf commissioner, had no record of delivery at that port, and fixed the responsibility for the nondelivery of the supplies upon the claimant. The claimant has no receipts from any one on behalf of the United States showing the delivery of the supplies.

Payment has been made to Adler & Company by Paymaster Kenneth C. McIntosh, of the *Dubuque*, of their bill for supplies, amounting to \$99.01, itemized *supra*, by check No. 415441, dated February 26, 1909, and the amount so paid has been deducted by the Auditor from amount otherwise due the claimant, as representing the damage suffered by the United States on account of the nondelivery by it of the supplies for the United States delivered by Adler & Co. to it as

common carriers for transportation and delivery to the *Dubuque*.

Claimant does not deny the receipt by it from Adler & Co. of the supplies, nor the prepayment of freight by Adler & Co. thereon, but contends that it did not understand that the Government had any interest in the shipment, and that it actually delivered the supplies to the *Paducah* for delivery to the *Dubuque*, and invites attention to the provisions of section 3648 of the Revised Statutes.

The issuance by claimant of a bill of lading, acknowledging the receipt of the supplies from Adler & Co. and agreeing to deliver them to the U. S. S. *Dubuque*, Care of American Consul, Puerto Cortez, and its statement that it actually delivered them to a vessel of the United States, negative its contention that it did not understand that the Government had any interest in the shipment. The mere statement of the claimant to the effect that it delivered the supplies to the United States, in the absence of the submission by it of any proof of actual delivery, is insufficient to controvert the findings of the Board of Survey and of the Navy Department to the effect that the supplies were never delivered to the United States by the claimant.

Section 3648 of the Revised Statutes referred to by the claimant is a statute prohibiting payment for articles prior to delivery. In so far as payment by the United States to Adler & Co. is concerned delivery of the supplies by them to the claimant for carriage to a vessel of the United States was as between them and the United States delivery to the United States and vested

the title in said supplies in the United States *United States v. Andrews*, 207 U. S. 229, 240; *Andrews v. United States*, 41 Ct. Cl., 48, 59; *Grove v. Brien, et al.*, 8 How., 439; *Easton v. George Wostenholm & Son*, 137 Fed. Rep., 533 *Lawrence et al. v. Minturn*, 17 How., 107; *Danne-miller, Appellants v. Kirkpatrick*, 201 Pa. St., 218; *Magruder & Bro. v. Gage*, 33 Md., 344, 350; *Hamilton v. Brewing Co.*, 129 Iowa, 179; *Equitable Mfg. Co. v. Engelke*, 39 N. J. L., 567; *Althouse v. McMillen*, 132 Mich., 145; *Hague v. Porter*, 3 Hill's Rep. (N. Y.), 141; *Dr. A. P. Sawyer Medicine Co. v. Johnson*, 178 Mass. 277; *Hill v. Gayle & Bower*, 1 Ala., 277; 15 Comp. Dec., 170), notwithstanding the prepayment of freight by Adler & Co. in compliance with a general requirement of the claimant in its printed bills of lading to the effect that shippers shall pay the freight (*United States v. Andrews & Co.*, *supra*; *Dr. A. P. Sawyer Medicine Co. v. Johnson*, *supra*; *Easton v. George Westenholm & Son*, *supra*; 8 Durnford & East's Rep., 334). Payment was not therefore made by the United States to Adler & Co. prior to delivery by Adler & Co. to the United States of the supplies for which payment was made.

No liability attached to Adler & Co. because of any negligence of the claimant in delivering the supplies, the United States having designated the claimant as the carrier by which the supplies were to be transported to it (*Morris v. Warlick*, 118 Ga., 422). The United States having directed Adler & Co. to deliver the supplies to the claimant, and the claimant having accepted the supplies and agreed to deliver them to the United

States, the claimant became the agent of the United States for the transportation of such supplies (*United States v. Andrews, supra*; *Althouse v. McMillan*, 132 Mich., 147; *Dr. A. P. Sawyer Medicine Co. v. Johnson*, 178 Mass., 377), and liable to the United States for the cost of such supplies, including freight, drayage, and insurance charges, if lost through its negligence while in its custody. (*The Scotland*, 105 U. S., 24; *Steamship Aleppo*, 7 Ben., U. S., 120; *The Umbria*, 59 Fed. Rep., 489; *The Beatrice Havener*, 50 Fed. Rep., 232; *The Menominee*, 125 Fed. Rep., 530. See also *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S., 441; *The Guildhall*, 59 Fed. Rep., 799; act of February 13, 1893, 27 Stat., 445.)

The Auditor's action in deducting said item is affirmed. (7 Comp. Dec., 65.) A certificate of no difference as to such item will issue.

(Signed) L. P. MITCHELL,
Assistant Comptroller.

[COPY]

ENCLOSURE NO. 23

Appeal #24874.

EWM-8-D, TREASURY DEPARTMENT,
Washington, September 23, 1915.

The New York and Cuba Mail Steamship Company applied July 27, 1915, for revision of the settlement by the Auditor for the Navy Department, No. 8071, dated June 28, 1915, of claims for freight and reimbursement for deductions, amounting to \$497.39.

The Auditor made certain disallowances which he explains as follows:

The differences are as follows:

Total amount claimed-----	\$497. 39
Allowed-----	474. 20
Disallowed-----	23. 19

thus explained:

Bill 1287, value of 1 bale of dry goods missing on delivery shipped on B/L No. 5799, Nov. 5, 1914, and freight charges--	15. 53
Bill No. 1440, Bill of Lading short accomplished 1 Drum of Paint, and other articles, value of paint being chargeable to the company-----	6. 10
Bill No. 1415, difference in freight on 21 cu. ft. towels, claimed Merchandise rate, allowed tariff rate applicable to "Dry Goods," as explained in letter to you dated April 5, from the Assistant to the Bureau, Navy Department, difference--	. 84
Bill No. 1430, overcharge on item of 612 lbs. Stove Castings, rated 3rd class, instead of 5th class, the latter appearing proper rating as Castings N. O. S.-----	. 72
	23. 19

The appeal is from the first two disallowances. The first of these is claim for reimbursement of \$15.53, which had been deducted by the Bureau of Supplies and Accounts in the payment of freight bills, for a bale of dry goods weighing 43 pounds, part of a shipment of 34 packages made November 5, 1914, on appellant's steamship *Morro Castle* from New York under Navy Bill of Lading No. 5799, and consigned to the U. S. S. *Petrel* at Vera Cruz, Mexico, or "in the absence of the *Petrel* to be delivered to any other U. S. ship present." The appellant company's officers state that the shipment was delivered to the "Vera Cruz Terminal Company" on November 13, 1914, and the bill of lading shows that it was delivered on board the U. S. S. *Minnesota*, December 15, 1914, with a shortage. The Squadron Paymaster, Detached Squadron, Atlantic Fleet, for Com-

manding Officer, U. S. S. *Petrel*, acknowledged the delivery on the *Minnesota* and endorsed the shortage as follows:

1 bale dry goods weighing 43 pounds not delivered.

In reply to a request of the Bureau of Supplies and Accounts for a copy of the receipt held by the company, the Acting General Manager stated May 13, 1915—

I regret that we are not in possession of that document at this end but enclose herein a copy of a letter received from Mr. T. W. Wuerpel, Acting Superintendent of the Compania Terminal de Veracruz, S. A., dated December 28th, 1914, * * *.

The letter enclosed is as follows:

COMPANIA TERMINAL DE VERACRUZ, S. A.,
Veracruz, Dec. 28, 1914.

Capt. A. ROBERTSON,
Agent Ward Line, City.

DEAR SIR: Replying to your favor of the 17th instant reference R/C ex Morro Castle 256, Nov. 13/14, please be informed that shipment covered by bill of lading #78 was delivered to and signed for without exceptions.

Yours truly,

T. W. WUERPEL,
Acting Superintendent.

I understand that the signing without exception refers to the receipt by the Terminal Company. This company was not the agent of the United States.

By a letter of August 10, 1915, this office requested information of the company as follows:

* * * in your letter of February 20, 1915, signed by H. E. Cabaud, General Agent, to the Bureau of Supplies and Accounts, Navy Department, you state:

"Our investigation shows that your ship took delivery from the Vera Cruz Terminal Company at Vera Cruz and signed receipt without exception."

Will you please send me the receipt referred to for use in revision of the Auditor's settlement. * * *

The copy furnished is of a receipt, not from the Vera Cruz Terminal Company, but from the Mexican Railroad Company, and seems to cover the shipment of which the bale of dry goods was a part. There is nothing in the paper showing that the lost goods were delivered to the *Minnesota* or any other United States vessel.

A survey was made by order of the commanding officer of the *Petrel* as to the missing bale and the report was:

Missing from shipment. Responsibility:
Morro Castle.

All this evidence is quite sufficient to show that the bale of dry goods in question was not delivered to the *Petrel* or other vessel of the United States or to any agent of the United States.

The Assistant General Manager of the appellant company by his letter of appeal contends that notwithstanding the non-delivery on board

the *Minnesota*, the company is not responsible because—

It is of common knowledge that our bill of lading properly provides a delivery will be made at port of destination at time of release of cargo from ship's slings at shipside.

However that may be and what effect such stipulation might have, it is not necessary to be considered as the shipment, as before stated, was made on Government or Navy bill of lading which was received, signed, and treated as a bill of lading by the steamship company. This reads, in part—

Received from E. C. Tobey, Paymaster, U. S. N., General Storekeeper, by the Ward Line Stmr. *Morro Castle* the public property described below, in apparent good order and condition (contents and value unknown), to be forwarded subject to conditions stated on the reverse hereof, from New York to Vera Cruz, Mexico, by said company and its connections, there to be delivered in like good order and condition to commanding officer, U. S. S. *Petrel*, Vera Cruz, Mexico * * *. In the absence of the U. S. S. *Petrel*, this shipment to be delivered to any other U. S. ship present * * *.

There is no such provision in the bill of lading similar to that referred to as contained in the company's ordinary bill of lading relieving of responsibility "at the time of release of cargo from ship's slings at shipside."

From all the evidence submitted I am of opinion that the Auditor's disallowance of this item is correct and it is affirmed.

The other item appealed from was a claim for reimbursement of \$6.10 which was deducted by the Bureau of Supplies and Accounts in the payment of freight bills, for one drum of paint part of a shipment of 147 packages made March 4, 1915, on the S. S. *Pathfinder* from New York to Tampico, Mexico, consigned to the commanding officer of the U. S. S. *Petrel* under Navy bill of lading No. 12780.

The following notation was made on the bill of lading on receipt of the goods at New York:

1 Drum Paint short in dispute, if found on board to be delivered.

The drum of paint was not received at Tampico but was excepted on the bill of lading. No other evidence is submitted as to the delivery of the paint in question to the appellant for shipment except the certificate of the General Storekeeper on the bill of lading, and as the notation of the shortage was at once made on the said bill at New York and the drum of paint was not delivered at destination its shipment seems doubtful. I do not think the carrier company should be charged.

The action of the Auditor in disallowing this item is therefore disaffirmed and a difference is found from his settlement in favor of the appellant of six dollars and ten cents (\$6.10). A certificate will be issued accordingly.

(Signed) W. W. WARWICK,
Comptroller.

[COPY]

ENCLOSURE NO. 24

Appeal No. 12863

CCM 6, TREASURY DEPARTMENT,
OFFICE OF CONTROLLER OF THE TREASURY,
October 31, 1906.

Barber and Company, Incorporated, of New York, N. Y., appealed October 25, 1906, from the action of the Auditor for the War Department in his settlement No. 33079, dated September 13, 1906, wherein he disallowed the sum of \$174.28 in the claim of said company. The reasons for such disallowance are stated by the Auditor in his certificate as follows:

The claim for freight charges amounting to \$482.34, on original bill of lading No. 5588, covering a shipment from New York City to Manila, P. I., December 16, 1905, without deduction for the loss of 1 box, containing 100 bottles, of Hydrocyanic Acid and 12 casks of Calcium Carbide.

The box of acid and the casks of carbide were stored on deck and the bill of lading provided that shipments were carried on deck at the shipper's risk.

The only evidence as to the cause of the loss is the following statement of the Captain of the Steamship:

"We had very bad weather passage across the Atlantic; a succession of wind the whole way over. It was at the worst on Christmas night until 8 P. M. We shipped a tremendous sea and washed a lot of the acids overboard. The steering gear got jammed with them and nearly broached the ship, so we were obliged to

let the rest go as well. The bad weather continued right on to St. Vincent."

By direction of the Quartermaster General this case was referred to the Controller of the Treasury for his decision as to the proper basis of settlement. The Controller, June 6, 1906, authorized the Depot Quartermaster New York City, to pay the claim after deducting the value of the property lost and the freight on the same. Barber & Co., refused to accept payment on that basis and the claim was forwarded to this office for settlement.

No new evidence that the "deck cargo" was properly stored and adequately protected in its exposed condition, as required by the Controller, was presented, except the Certificate of Loading of the Surveyor of the Board of Underwriters of New York, dated December 16, 1905, which is not considered by this office to be conclusive of the question at issue, and there being reason for immediate settlement, such settlement is made under the decision of June 6, 1906, above mentioned.

Amount claimed.....	\$428.34
Amount claimed.....	308.06
Amount disallowed.....	174.28

Arrived at as follows:

Value of Hydrocyanic Acid lost.....	\$12.00
Freight on Hydrocyanic Acid lost.....	.28
Value of Calcium Carbide lost.....	120.00
Freight on Calcium Carbide lost.....	42.00
	174.28

This case was once before considered by this office in a decision addressed to the Deputy Quartermaster General of the Army, dated June 6, 1906 (See 12 Con. Dec., 746). At that time the record transmitted to me contained no evidence

as to the manner in which the stores were loaded on the vessel nor was there any evidence to disprove the presumption of negligence or careless loading on the part of said company. (See 51 Fed. Rep., 605; 15 Fed. Rep. 686; 106 Fed. Rep., 319.)

The record now before me on this appeal contains the certificate of the Surveyor for the Bureau of Inspection of the Board of Underwriters of New York that the S. S. *Shimosa* had "completed her loading at this port, under this inspection, and has conformed to all the rules of the Board of Underwriters of New York in relation thereto."

The following affidavit is also now submitted:

Charles M. Tiffany being duly sworn, says: I am Superintendent Stevedore for the Atlantic Stevedoring Company, the concern that loaded and stowed on the steamship *Shimosa* in December 1905, some boxes of hydrocyanic acid and casks of calcium carbide.

These boxes and casks were in the ordinary form of packages containing similar merchandise such as have come frequently under my notice for a number of years.

The boxes and casks were stowed on the deck forward and also aft. They were secured by means of lumber between the boxes and casks to keep them from shifting as the ship rolled and also with rope lashing on top to keep them from being dislodged if a sea washed on board.

I have had twenty years' experience in stowing deck cargoes. The stowing of this cargo was done under my direct supervision. I know that when the stowing of the casks and boxes was completed that they

were well, carefully and securely stowed and lashed so that they would, according to all reasonable foresight, carry safely in any ordinary weather that might be anticipated.

It is the usual practice to stow such cargo upon the deck. Indeed, it is not considered a safe nor prudent thing to stow such cargo under deck where it might possibly come in contact with other cargo. I have frequently seen shipments of similar cargo leave this port consigned to the Government stowed on deck and in a similar manner to that in which the cargo in this instance was stowed.

There was not, in my opinion, any reasonable precaution known to experienced stevedores that could have been taken in the stowing of this cargo to have secured any greater safety than that actually obtained.

The Atlantic Stevedoring Company stows on vessels at the port of New York every year cargo of more than a million tons. All this stowing is done under my supervision.

Sworn to before me/ this 23rd day of October 1906.

CHAS. M. TIFFANY.

CHARLES R. HICKOK,

Notary Public, New York County.

This affidavit was not before the Auditor when he disallowed the claim.

This detailed explanation by Mr. Tiffany is, to my mind, sufficient to exonerate the company from the charge or presumption of having loaded the cargo negligently or carelessly. Since, therefore, it was properly loaded and was subsequently washed overboard and lost, the loss must be re-

garded as occasioned by peril of the sea for which Barber and Company are not liable.

The action of the Auditor is therefore reversed, upon the new evidence now furnished, and a certificate of difference in favor of Barber & Co. will herewith issue for \$174.28.

(Signed) R. J. TRACEWELL,
Controller.

[COPY]

ENCLOSURE NO. 25

Appeal No. 24874.

TREASURY DEPARTMENT,
Washington, January 8, 1916.

The New York and Cuba Mail Steamship Company applied October 14, 1915, for reconsideration of the decision of this office of September 23, 1915, on appeal No. 24874, affirming the action of the Auditor for the Navy Department in disallowing, by settlement No. 8071, dated June 28, 1915, \$15.53, the value of one bale of dry goods, and freight thereon short delivered in shipment by appellant's steamship *Morro Castle* from New York under Navy Bill of Lading No. 5799, consigned to the U. S. S. *Petrel* at Vera Cruz, Mexico, or "in the absence of the *Petrel* to be delivered to any other U. S. ship present."

The shipment was delivered to the "Vera Cruz Terminal Company" on November 13, 1914, and the Squadron Pay Officer, who had the duty of looking after shipments, states that the consign-

ment was removed to the U. S. S. *Minnesota* the following day, when the shortage was discovered. In the decision of September 23 it was held that the Vera Cruz Terminal Company was not the agent of the United States to receive the shipment. It was said—

All this evidence is quite sufficient to show that the bale of dry goods in question was not delivered to the *Petrel* or other vessel of the United States.

In the letter requesting reconsideration of the decision it is said:

A very important factor has evidently not been given proper consideration; that is, the New York and Cuba Steamship Company, as carrier, is compelled by the Mexican Government to make a delivery of all cargo at Vera Cruz at a place designated by the Mexican Government port officials. The place designated is the wharf of the Vera Cruz Terminal Company and is known as the Profirio Wharf.

In the appellant's letter of July 30, 1915, requesting revision of the Auditor's settlement disallowing the item in question no statement was made, as now appearing, that the Mexican laws required the delivery to the Vera Cruz Terminal Company.

Such being the case, and I do not question the credibility of the evidence given by the appellant's statement, I am of opinion that the carrier company is relieved of responsibility for

shortages occurring after delivery of the goods to the Vera Cruz Terminal Company, that company having receipted in full for the consignment. The relief of the carrier from responsibility under such circumstances is recognized by the courts. It was held in *Herbst v. The Asiatic Prince* (97 Fed., 343), quoting from the syllabus:

A ship's delivery of a consignment of dutiable goods to the customs authorities, being required by the law and usage of the place, delivery to the proper party thereafter devolving on such authorities, is a good delivery as between the shipper and carrier.

This was affirmed by the Circuit Court of Appeals (108 Fed.; 287).

Upon this rehearing and reconsideration the Auditor's disallowance of the item of \$15.53 in question is disaffirmed and a further difference from the Auditor's settlement is found in favor of the appellant of fifteen dollars and fifty-three cents (\$15.53). A certificate will be issued accordingly.

(S) W. W. WARWICK,
Comptroller.

[illegible]

[Reverse]

GENERAL CONDITIONS AND INSTRUCTIONS

CONDITIONS

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

2. Unless otherwise specifically provided hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

3. Shipment made upon this bill of lading shall take no higher rate than provided for shipments made upon the uniform or standard bill of lading or standard receipts.

4. No charge shall be made by any carrier for the execution and presentation of bills of lading in manner and form as provided by the instructions hereon.

5. This shipment is made at the restricted or limited valuation specified in the tariff or classification at or under which the lowest rate is available, unless otherwise indicated on the face hereof.

INSTRUCTIONS

1. Erasures, interlineations, or alterations in bills of lading must be authenticated and explained by the person making them.

2. Shipping order, original bill of lading, and memorandum bill of lading should be used in making a shipment. Only one original bill of lading will be issued for a single shipment. The shipping order should be furnished the initial carrier. The original bill of lading and memorandum copies should be signed by the agent of the receiving carrier, returned to the consignor, and the original promptly mailed to the consignee. The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. Memorandum copies of bills of lading may be used as administrative officers direct.

3. In the absence of the consignee, or on his failure to receipt, the person receiving will certify that he is duly authorized to do so, reciting such authority.

4. In no case will a second bill of lading be issued for any shipment, nor will a bill of lading be issued after the transportation has been performed. In case the bill of lading has been lost or destroyed, the carrier will furnish with its freight bill, to the officer charged with the settlement of the account, a certificate, in duplicate, certifying over the signature of the proper officer of the carrier the weight and description of the property transported, giving number, date, and place of issue of the bill of lading therefor, that said bill of lading is not in its possession or can not be located, and that if same should later be found it will be surrendered at once to the proper officer of the United States and no claim made thereon.

On receipt of such certificate of loss of bill of lading the administrative officer will, if his records show that payment of the transportation charges has not been made, call upon the issuing officer to furnish a certificate of shipment showing the same information as given on the bill of lading; this certificate to be forwarded by the issuing officer to

the consignee, who will complete the certificate showing whether the property was received in good order and condition and the weight thereof on receipt. This completed certificate will be returned to the administrative officer and settlement will be made on the certificate of shipment in lieu of the original bill of lading. Should the original bill of lading be located after settlement has been made on the certificate, it will be forwarded to the auditor for the department concerned and filed with the original voucher.

5. To insure prompt delivery of property, in the absence of the bill of lading, the consignee may give to the carrier a receipt for the property actually delivered, which will state that it is given because the bill of lading has not come to hand. On the recovery of the bill of lading, or when the certificate provided for above shall have been given, a statement will be indorsed on said bill of lading or certificate of the fact of the delivery as per said temporary receipt, and the said temporary receipt will be indorsed with reference to the bill of lading or certificate sufficient to identify the same, and both papers attached and forwarded with the claim for payment thereon.

6. In case of loss or damage to property while in the possession of the carrier, such loss or damage shall when practicable, be noted on the bill of lading before its accomplishment. All practicable steps shall be taken at that time to determine the loss or damage and the liability therefor, and to collect and transmit to the proper officer, without delay, all evidence as to the same. Should the loss or damage not be discovered until after the bill of lading has been accomplished, the proper officer shall be notified as soon as the loss or damage is discovered, and the agent of the carrier advised immediately of such loss or damage, extending privilege of examination of shipment.

7. Bills must be submitted by the general officers of carriers, and on forms furnished by the Government, to be obtained from the Public Printer, Washington, D. C.

ADMINISTRATIVE DIRECTIONS

1. Government property will be transported on the prescribed form of Government Bill of Lading (original, memorandum, and shipping order), which will be identified by serial numbers.

2. Through bills of lading will be issued in all instances between initial and ultimate points, except when rates more advantageous to the Government may be otherwise secured.

3. When shipments are made under contract or special rates, notation of such fact should appear on the face of bills of lading.

4. Officers charged with the duty of providing or securing Government transportation should familiarize themselves with land-grant railroads in order that shipments may be made at the lowest rates available to the Government by the use of such lines, or lines equalizing rates therewith.

5. Bills of lading must describe shipments of articles by their commercial names, giving separately such weights, dimensions, and manner of packing as may be necessary to ascertain classifications and rates and to enable recovery in case of loss or damage.

6. Public property may be delivered by any Government officer or agent to the Quartermaster's Department of the Army, which will ship the same under its regulations. (23 Stat., 111.)

7. If the number of articles to be shipped be too great for the blank form (original, memorandum, and shipping order), extra sheets of the prescribed form should be used, and so attached and designated as to form but one bill of lading, under one number.

8. A voucher when submitted for settlement shall cover charges to one office or service only. The name of the office is inserted at the foot of the bill of lading. Correspondence regarding transportation accounts shall be addressed to the particular office or service and

reference made to the serial numbers of the Government bills of lading included in the company's bill.

REPORT OF LOSS, DAMAGE, OR SHRINKAGE

Explanation regarding loss, damage, or shrinkage to be made by consignee, who will state all the facts available concerning the nature or extent of the loss, damage, or shrinkage, and how it occurred.

The within shipment was received with the following loss, damage, or shrinkage:

[COPY]

ENCLOSURE NO. 27

ASSISTANT COMPTROLLER GENERAL

OF THE UNITED STATES,

Washington, Sep. 9, 1930.

The Munson Steamship Line applied March 19, 1930 for review of settlement T-68486, March 10, 1930 of bill Mystic 8-SB.PH-SF.B/L 53, wherein \$1.24 was disallowed from freight charge and \$21.12 was deducted as the value of loss in a shipment of 200 cases, 21,200 pounds cresol in cans from Philadelphia, Pa., to Mare Island, Calif., per bill of lading N-605606, April 18, 1929.

The carrier claimed \$190.80 based on 21,200 pounds at 90 cents per 100 pounds and allowance was made for \$189.56 based on 21,062 pounds, the delivered weight, from which was deducted \$21.12 as the value of 16 gallons of cresol at \$1.32 per gallon, lost through leakage.

The carrier in its application for review states that it must protest the deduction of \$21.12 on account of leakage from the cases, as the shipment was outturned on the West Coast with no signs of bad handling and the bill of lading specifically relieves the steamer from liability for

ordinary leakage in which class it is contended this damage falls.

The Government bill of lading which the carrier filed in support of its claim for transportation charges contains a statement that:

Shipment covered by this B/L checked at Mare Island several cases leaking. Check of contents showed a loss thru leakage of 16 gallons cresol. Value 16 gallons cresol at \$1.32—\$21.12, weight deducted 138#.

The carrier has acknowledged that the cases arrived in San Francisco in a leaking condition. The shipment was delivered to the steamship company in good condition and the damage to the cans causing the leakage appears to have occurred after delivery to the carrier at Philadelphia and before delivery at San Francisco.

The bill of lading exception "leakage, evaporation," etc., can not free the carrier from liability for a leak caused by negligence of the crew in handling and stowing the shipment. The cresol was in cans and the containers were not ordinarily from their inherent nature subject to leakage or evaporation. The leakage appears to have been such as would be occasioned ordinarily only by crushing or puncturing the cans and if such damage was due to rough handling and stowage the responsibility rests with the carrier. Under such circumstances, the leakage having occurred while the shipment was in the custody of the carrier, liability therefor may be avoided by the carrier, only upon proof that the leakage was not due to

the carrier's negligence. Such fact has not been established.

The settlement is sustained.

(Signed) LURTIN R. GINN,
*Assistant Comptroller General
 of the United States.*

[COPY]

ENCLOSURE NO. 28

ASSISTANT COMPTROLLER GENERAL
 OF THE UNITED STATES,
Washington, July 31, 1934.

Chief, Claims Division:

Returned herewith is the claim of the Texas and New Orleans Railroad Company for \$32.68, representing \$2.94 freight charges disallowed in settlement T-78982, November 25, 1931, and \$29.74 deducted in said settlement as the value of certain property shipped from New York, N. Y., destined to New Orleans, Algiers, La., per bill of lading N-764369, May 5, 1931, and destroyed in transit. The bill of lading bore the following notation concerning loss or damage:

1 Bbl Chinaware, wt. approx. 151 $\frac{2}{3}$ lbs.,
 3 cups, 81 dinner plates.

1 Bbl Chinaware, wt. 85 Lbs. all items.

The above material checked short

* * * * *

Invoice value * * * 29.74.

The disallowance and deduction noted above were made in accordance with this notation.

It appears that the shipment, consisting of certain articles in addition to the foregoing, was accepted by the Morgan line at New York and

moved therefrom May 6, 1931, on the S. S. *El Capitan*. Also, that the missing articles were destroyed by fire aboard ship; the average adjusters, Marsh & McLennan, New York, N. Y., having advised the Bureau of Supplies and Accounts, Navy Department, by letter of December 2, 1932, as follows:

We have for acknowledgment your inquiry of November 25th, concerning 2 Barrels of China ware forwarded by the Navy Supply Depot, New York to the Naval Operating Base, New Orleans, La., which were destroyed by fire on the Steamship *El Capitan* Voyage No. 151.

The records of the Southern Pacific Steamship Company, including the ship's manifest indicate that this cargo was actually on board at the time of the fire and survey report of General Average Cargo Surveyor, Mr. John A. McKee, Hibernia Bank Building, New Orleans, indicates that 2 barrels of China ware were destroyed in the fire. The outturn record of the Southern Pacific Steamship Company indicates that these 2 barrels were not discharged from the vessel at New Orleans after the fire had occurred.

Inasmuch as the damage was not the result of the General Average act, we are unable to make good the loss in General Average. If any further information is required please call upon us.

The Navy Department reports that—

There is no record of a claim having been received for general average contribution from the average adjusters, and in view of the statement in copy of letter enclosed, that the damage was not the result of a

general average act, and inasmuch as the shipment was not insured, it is recommended that the amount withheld be refunded.

It thus appears that the property having been destroyed by fire and not as a voluntary sacrifice for the common benefit of the cargo, no right accrued to reimbursement of the value thereof in general average. Also, under the provisions of Section 4282, Revised Statutes, no owner of any vessel is liable to answer for or make good any loss or damage to any merchandise on such vessel by reason of any fire happening on board the vessel, unless such fire is caused by design or neglect of such owner. There is nothing to indicate any such design or neglect in the instant matter and accordingly the sum of \$29.74 deducted as the value of the destroyed property may be allowed. See in this connection *In re Old Dominion S. S. Company*, 115 Fed. 845, and memorandum to you of July 2, 1931, in the case of the Dollar Steamship Lines, Inc., A-36841.

Concerning the freight charges on the destroyed property, claimed in the amount of \$2.94, the general rule is that, in the absence of some stipulation to the contrary, the goods must be carried to destination before any freight is earned. See 58 C. J. 500, 503, "Shipping," sections 831, 838, and 840. The shipment here concerned moved under a Government bill of lading which contained in Condition 1, the provision—

Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly ac-

complished, attached to freight voucher prepared on the authorized Government form; payment will be made to the last carrier, unless otherwise specifically stipulated.

This provision clearly contemplated that payment of freight charges were not to be made until the shipment was delivered at destination. It is accordingly inconsistent with and supersedes any requirement in the carrier's commercial or ocean bill of lading to the effect that freight shall be prepaid and that prepaid freight is to be considered as earned on the shipment of the goods and is to be retained by the ship owner "vessel or cargo lost or not lost." See *Toyo Kisen Kaisha v. W. R. Grace & Company*, 48 Fed. (2d) 850; affirmed 53 Fed. (2d) 740.

The claim for freight charges, amounting to \$2.94, should be disallowed for the reason that freight was not earned on the property destroyed in transit.

(Signed) R. N. ELLIOTT,
*Assistant Comptroller General of the
United States.*

[COPY]

ENCLOSURE NO. 29

COMPTROLLER GENERAL OF THE

UNITED STATES,

Washington 25, Oct. 17, 1935.

MUNSON STEAMSHIP LINE,

*Munson Building, 67 Wall Street,
New York, N. Y.*

GENTLEMEN: Reference is made to your letter dated September 11, 1935, signed by A. Becraft,

in the matter of settlement T-922201 $\frac{1}{2}$, dated June 19, 1934, which disallowed claim (Munson Steamship Line bill Munorleans V 69 S) for \$98.60 in addition to \$203.35 paid by Colonel Charles R. Sanderson, disbursing officer, United States Marine Corps, on voucher 7009, January 19, 1934 (Munson Steamship Line bill Munorleans 69 NB) for freight transportation from New Orleans, Louisiana, to Philadelphia, Pennsylvania, under bill of lading M-26601-34, dated July 28, 1933. On the back of this bill of lading in the space provided for "Report of Loss, Damage, or Shrinkage," the receiving officer reported—

The * * * shipment was received with the following less * * *

Box #42 was found pilfered and 29 flannel shirts, value \$98.60, weight 32 pounds, missing. Box examined by agent of carrier and pilfering acknowledged.

The carrier originally claimed \$303.13 for this transportation but the claim was returned by the Marine Corps for restatement on a basis which would reflect a deduction of \$98.60 as the value of 29 shirts missing from the box numbered 42. The carrier having requested report of the receiving officer as to "nature of exceptions taken at time of delivery, particularly what exterior signs this box had of pilferage", and the officer's report being—

* * * no exception was taken on the delivery of the goods, as it was a case of concealed loss.

As soon as the loss was discovered, the case was set aside and your Mr. Wright

notified. An Inspector from his office examined the case, and after minute inspection the case was found to have been broached on one side and recoopered.

The carrier thereafter restated the charge for the service in amount of \$203.35 (bill Munorleans 69 NB) on the basis of freight charges in amount of \$301.95 "Less claim account shortage—\$98.60" and payment in amount of \$203.35 was made by Colonel Sanderson on voucher 7009 (check No. 105664 dated January 19, 1934) and accepted by the carrier apparently without protest. Several months later, however, the carrier submitted claim (bill Munorleans V 69 S) for the \$98.60 as deducted on bill Munorleans 69 NB urging—

* * * Our claim department has investigated * * * claim and feels that it should be disallowed. * * * under the bill of lading, concealed loss does not constitute steamer's liability—our obligation being limited to delivery of containers intact as received—which apparently was accomplished in this instance.

This claim was disallowed in settlement T-92220 $\frac{1}{2}$, for the reasons set forth therein. The carrier now urges—

* * * Acceptance of cargo without complaint or exceptions constitutes good delivery. Except for this, carriers would be accountable for what might occur subsequently.

* * * We feel * * * that we are entitled to payment * * * as it is not our custom to honor concealed loss and damage claims, since we give maximum protection on our steamers by stowage in

lockers under special custody of the mate, any risks of pilfering falling on the cargo which is ordinarily insured against.

Since this submission the receiving officer has reported further as follows:

(a) The missing shirts have not been located nor has there been an overage of a similar number of shirts reported at another station, within the knowledge of this office.

(b) The movement from the vessel at Philadelphia was made by Government conveyance and personnel.

(c) In so far as could be ascertained by this depot, there are no facts which might indicate that the missing shirts may have been abstracted at any time other than after delivery to the carrier at New Orleans and before delivery by the carrier at Philadelphia.

(d) The package in question was received at this warehouse, 8 September, 1933. However, it was not until the shipment was being removed from the containers preparatory to placing the contents in stock, on or about 15 September, 1933, that the shortage was definitely determined. At that time, box #42 was weighed before being opened, and the discrepancy in the weight caused a minute inspection, which revealed the fact that the box had been tampered with. The carrier was immediately notified of this fact and a representative visited this depot and inspected the pilfered box. Upon inspection by agent of the carrier, it was ascertained that the box had been expertly broached, a portion of the contents removed, and then recoopered.

(e) The fact that the box had been re-coopered could not have been determined at the time of its receipt from the carrier due to the fact that the re-coopering had been so well performed that only the closest scrutiny revealed this.

Thus the record shows as follows:

The carrier received this package apparently on July 28, 1933, and receipted for it as weighing 112 pounds and "in apparent good order and condition." Thereafter during a period of approximately six weeks, that is until September 8, 1933, the package was in the carrier's possession and when delivered to the consignee it was not obviously apparent from its appearance that there had been any tampering with its contents. Shortly thereafter, however, when about to open the package the consignee discovered a marked discrepancy between the then weight and the weight receipted for and charged for by the carrier, indicating abstraction of some part of the contents and he immediately notified the carrier whose inspector examined the package, ascertaining that it had been expertly broached, part of the contents removed and the package re-coopered. The fact of the shortage was set forth on the bill of lading in the terms hereinbefore quoted apparently before surrender thereof to the carrier who accepted it in that form, deducted the value of the missing articles from the freight charges on the shipment, certified the account as so stated "correct and just" and accepted payment on that basis thus indicating assumption of liability for the shortage.

The missing articles have not been located and delivered, a similar overage has not appeared elsewhere and there is nothing to indicate that they might have been abstracted other than while in the carrier's possession. Concerning the carrier's assertion in the matter of concealed loss and damage there is for consideration that—

“By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship, carrying goods for hire, whether employed in internal, in coasting or in foreign commerce, is a common carrier, with the liability of an insurer against all losses, except only such two irresistible causes as the act of God and public enemies.”

Liverpool and Great Western Steam Company v. Phenix Insurance Company, 129 U. S. 397 (437). See, also, *The Jason*, 225 U. S. 32, 56 L. Ed. 969; *the Willdomino*, 300 Fed. Rep. 5 (9/10) affirmed 272 U. S. 718, 71 L. Ed. 491.

In this situation there appears no basis to justify this office in certifying as properly chargeable against appropriated funds the amount now claimed by the carrier. On the contrary it appearing that the payment by Colonel Sanderson was on the basis in part of 97 cents per 100 pounds and a weight of 112 pounds for the package numbered 42 whereas the carrier delivered only 80 pounds there was an apparent overpayment of 31 cents which will be deducted in the settlement of an open account.

Respectfully,

(Signed) R. N. ELLIOTT,
Acting Comptroller General of the
United States.

ENCLOSURE NO. 30

ASSISTANT COMPTROLLER GENERAL

OF THE UNITED STATES,

*Washington, May 9, 1940.*NORFOLK AND WASHINGTON, D. C. STEAMBOAT
COMPANY,*Accounting Department,**Seventh Street Wharves,**Washington, D. C.*

GENTLEMEN: There has been considered your request for review of the disallowance, made by settlement T-142138 $\frac{1}{2}$, March 8, 1939, of your bill 9353-A for \$587.96 in connection with the transportation in May and June, 1937, of household goods and professional books from Shanghai, China, and Bremerton, Washington, to Washington, D. C., under bills of lading M-41492-37 and M-29540-37.

The record shows that your bill 9353, claiming total charges in the amount of \$724.90 for transportation and terminal charges under the above bills of lading, was paid in the amount claimed by Lieutenant Colonel Jeter R. Horton, Marine Corps disbursing officer, on voucher 9419, December 21, 1937. Thereafter you presented bill 9353-A for \$587.96 additional and this claim was disallowed in full in settlement T-142138 $\frac{1}{2}$ because:

The claimant originally submitted its bill for freight charges for \$1312.86, which the Marine Corps returned for restatement to \$724.90 covering single haul charges. The claimant thereupon submitted its bill for \$724.90 and certified it "Correct and just." In submitting the bill for \$724.90 the claim-

ant made no statement that the smaller amount was being accepted under protest or that it reserved the right to claim an additional amount. So far as the present record shows, it appears that the claimant acquiesced in the payment of the smaller amount which will ordinarily effect discharge.

Therefore, there is nothing further due claimant.

The claim for \$587.96 had been transmitted to this office by The Quartermaster, Headquarters, U. S. Marine Corps, May 24, 1938, with the following statement concerning the prior payment in the amount of \$724.90:

There is inclosed Norfolk & Washington D. C. Steamboat Company supplemental bill #9353-A in the amount of \$587.96, claimed due from the Government in connection with two shipments of household goods, one from Shanghai, China to Washington, D. C., on bill of lading M-41492-37, and one from Marine Barracks, Puget Sound Navy Yard, Bremerton, Washington to Washington, D. C., on bill of lading M-29540-37. These two shipments were on the McCormick Line S. S. *West Mahwah*, which became stranded upon the rocks shortly after this steamer left San Francisco on its eastbound voyage #28 which voyage was abandoned and the cargo transferred to the McCormick Line S. S. *Everett*, which latter steamer transported the cargo to Norfolk, Va., at which port it was transferred to the Norfolk & Washington D. C. Steamboat Company for further transportation to Washington, D. C.

On 14 December, 1937, this office returned Norfolk & Washington D. C. Steam-

boat Company bill #9353 in the amount of \$1,312.86 for restatement to \$724.90, which was for single haul charges from points of origin to destination.

The record fails to show that the bill 9333 for \$724.90, as originally paid, contained any form of objection to accepting, as in full satisfaction of the charges properly due for the services in question, the amount therein claimed or any reservation of a right to claim an additional amount. On the contrary the bill was certified by the carrier, through its auditor, as being "correct and just." Moreover it is indicated that, although the original payment of \$724.90 was made in December 1937, the supplemental bill was not presented until May 1938, there being attached to said supplemental bill a copy of a letter dated May 16, 1938, from the carrier's auditor to U. S. Marine Corps, Quartermaster, Washington, D. C., in which no mention of the prior payment as having been accepted under protest is made. See in this connection *Oregon-Washington R. R. & Nev. Co. v. United States*, 255 U. S. 339; *Western Pacific Railroad Co. v. United States*, 255 U. S. 349; *Louisville & Nashville Railroad Company v. United States*, 267 U. S. 395; *Chicago, Milwaukee & St. Paul Railway Company v. United States*, 267 U. S. 403; *Southern Pacific Company v. United States*, 268 U. S. 263; *United States v. Reading Company*, 270 U. S. 320, 330. In view of the foregoing the record does not appear to support the conclusion that a claim for an additional amount for these services could now be maintained even if there had accrued originally a right to a larger amount.

The other matters urged, however, would seem insufficient to establish a right to the charges sought even as upon an original claim. It is not disputed that the charges paid, \$724.90, are those that would have been properly due had the shipments been transported without necessity for the transfer of lading from the S. S. *West Mahwah* to the S. S. *Everett*. It is urged, however, that in addition to the charges so accruing and paid, the carrier is entitled to payment of additional charges in the amount of \$587.96, being charges as for a new and separate shipment from San Francisco, California, the point at which the transfer of the lading occurred, to Norfolk, Virginia, the point at which the McCormick Steamship Company delivered the shipment to the Norfolk & Washington, D. C. Steamboat Company, plus certain charges incidental to the transfer at San Francisco. The occasion for the transfer of the lading from the S. S. *West Mahwah* to the S. S. *Everett* and the alleged transshipment is said to be that shortly after the S. S. *West Mahwah* left San Francisco "she ran aground and it was necessary to return her to San Francisco where she was declared a constructive total loss and her cargo discharged there." The S. S. *West Mahwah* was a vessel of the McCormick Steamship Company via whose line the bills of lading provided for transportation from the west coast port, to Norfolk, Virginia, the shipments having apparently been received by the S. S. *West Mahwah* at Seattle, Washington. The record shows that following notice that the S. S. *West Mahwah* had gone aground, Colonel Jeter R. Horton, A. Q. M., U. S.

M. C., addressed the Traffic Department, McCormick Steamship Company, by letter dated July 29, 1937, with respect to the shipment on bill of lading M-295-40-37, stating:

* * * it is requested that the above-mentioned shipment be forwarded to its destination by your next available steamer which it is understood is the S. S. *Everett* scheduled to sail from San Francisco August 10th and due to arrive at Norfolk, Virginia, September 5th. Since this is a Government shipment, this letter is your authority for making the transfer as requested. All freight charges involved should be billed to the Quartermaster, U. S. Marine Corps, Washington, D. C. The posting of the general average security will be effected prior to the arrival of your steamer at Norfolk.

The same officer also addressed the carrier by letter of August 6, 1937, relative to the other shipment, as follows:

The receipt is acknowledged of your letter of the 4th instant relative to forwarding of shipment of household goods covered by B/L M-41492-37, Shanghai, China, to Washington, D. C., which shipment was received by your S. S. *West Mahwah* at Seattle, Wash., and it is requested that this shipment be permitted to go forward via your first available sailing the S. S. *Everett* or a subsequent sailing.

The basis for the contention that under the above circumstances the carrier is entitled, in addition to the through charges already paid, to charges of \$587.96 as for a new and separate shipment from San Francisco, is said to be the

following provision appearing in standard bill of lading of the McCormick Steamship Company:

3. Full freight to destination on weight or measurement at Carrier's option at declared rates (unless otherwise agreed) and all advance charges against the Goods are due and payable to the Carrier upon receipt of the Goods by the latter; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid) Goods or vessel lost or not lost; and the same shall be payable in United States currency, or its equivalent in local currency at Bank demand rate of exchange on New York at Carrier's option, and the Carrier shall have a lien on the Goods or any part or proceeds for the whole thereof; and the Shipper. Consignee and/or assignee shall be jointly and severally liable therefor, and notwithstanding that any lien therefor has been surrendered. Full freight and charges shall be payable and so paid, on all damaged and unsound goods. * * *

It is insisted that the above provision is required to be applied by reason of the fact that the Government bills of lading on which the shipments

were accepted for transportation contained the provision:

Unless otherwise specifically provided hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

Thus the basis for the claim appears to be that under the above bill of lading provisions the right to payment of the full freight to the destination of the *S. S. West Mahwah* was earned when the vessel discharged the cargo at San Francisco and that for the transshipment in the *S. S. Everett* from San Francisco to Norfolk a right to charges as for a separate and independent shipment between those points accrued. As authority for the conclusion so urged reference has been made to the cases of *Allanwilde Transport Corporation v. Vacuum Oil Company*, 248 U. S. 377, and *James Richardson & Sons v. 158200 Bushells of Wheat, et al.*, 90 Fed. (2d) 607.

In the *Allanwilde* case there was involved a shipment of nails under a bill of lading containing a provision apparently similar to that quoted above from the standard bill of lading of the McCormick Steamship Company. There was involved also a shipment of oil, made under a charter party which provided "freight to be prepaid not on signing bills of lading. * * * Freight earned, retained and irrevocable, vessel lost or not lost." The further facts, as indicated by the decision, were that the goods were loaded aboard the

Allunwilde at New York, New York, which set sail from that port September 11, 1917, the consignments being destined to Rochefort, France. The vessel having encountered a severe storm at sea, about five hundred miles from New York, returned to that port for repairs, which were duly effected. The vessel then attempted to resume the voyage but was denied clearance by reason of an embargo placed against sailing vessels bound for the war zone. Thereafter the goods, upon notice from the carriers, were unloaded by the shippers under protest. It was held that the carrier was justified in refusing to refund the prepaid freight. In this connection the court stated:

The physical events and what they determined are certified. First, there was the storm, compelling the return of the ship to New York to avert greater disaster; then the action of the Government precluding a second departure. Does the contract of the parties provide for such situation and take care of it, and assign its consequences? The charter party provides, as we have seen, that "freight to be prepaid net on signing bills of lading. * * * Freight earned, retained and irrevocable, vessel lost or not lost." And it is provided that this provision is, with other provisions, "to be embodied" in the bill of lading. They seem necessarily, therefore, deliberately adopted to be the measure of the rights and obligations of shipper and carrier. Let us repeat: the explicit declaration is—"Freight to be prepaid net on signing bills of lading * * * Freight earned, retained and irrevocable, vessel lost

or not lost." The provision was not idle or accidental. * * *

Thus the decision appears to have been rested upon the fact that the inclusion of the provision was the deliberate act of the parties made with the intention that it, together with other provisions not inconsistent therewith, should be the measure of the rights and obligation of the carrier and shipper.

In the instant case the shipments were transported pursuant to the terms of Government bills of lading which stipulated that the property therein described was received by the initial carriers concerned "to be forwarded subject to conditions stated on the reverse hereof" from the points of origin named therein to Washington, D. C. "by said company and connecting lines." Bill of lading M-29540-37, covering the shipment from Bremerton, Washington, showed the Puget Sound Navigation Company as the initial carrier and specified transportation "via Seattle, Wash., McCormick SS Co., Norfolk, Va., Norfolk & Wash. SS Co." Bill of lading M-41492-37, covering the shipment from Shanghai, China, showed the Dollar Steamship Company as initial carrier and specified transportation "via Dollar Steamship Co., McCormick Steamship Co. to Norfolk, Va., Norfolk & Washington Steamship Co. To Washington, D. C." Under the heading of "Conditions" on the reverse of the bill of lading it was provided in each instance:

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

"1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

"2. Unless otherwise specifically provided hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier."

It is further stated on the reverse of the bills of lading in paragraph 2, under the heading of "Instructions," that—

* * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. * * *

Thus, under the express provisions of condition 1, payment for the service covered by the bill of lading was to be made upon presentation of the bill of lading "properly accomplished" and it is clear from the instructions as quoted above that execution of the consignee's certificate, showing receipt of the property at destination, was necessary to the proper accomplishment of the bill of lading. The Government bills of lading, therefore, required delivery of the shipments before the right to payment of freight charges should accrue, and this provision of the contract of car-

riage was not altered by the fact that the carrier's commercial bills of lading may have contained a provision for payment for full freight to destination "Goods or Vessel lost or not lost." In this connection it is to be noted that condition 2 of the Government bill of lading, under which it is claimed the shipments here concerned were made subject to the same rules and conditions as govern commercial shipments, contained the qualifying provision, "Unless otherwise specifically provided hereon." As indicated above the Government bill of lading itself provides for receipt of the goods by the consignee before payment, and any provision otherwise in commercial bills of lading of the carrier concerned would be inoperative as to the shipments here concerned.

A somewhat similar set of circumstances was involved in the case of *Toyo Kisen Kaisha v. W. R. Grace & Co.*, 3 Fed. (2d) 740. That case involved a shipment of nitrate of soda from Chilean ports destined to Honolulu, T. H. Arrangements for the transportation had been made in January 1921 and were confirmed in letter dated January 14, 1921, from the carrier to the shipper in which appeared the following:

2500 Long tons Nitrate of Soda March Shipment per *Tokuyo Maru* from Nitrate Port to Honolulu at \$7.00 per ton of 2240 lbs., gross weight delivered.

Freight payable in San Francisco on receipt of weights from Honolulu.

This cargo to be loaded according to custom of port in Chile and to be discharged at rate of 400 tons per day, 2000 tons to be discharged at railroad wharf, Honolulu, and 500 tons at Inter-Island

Steam Navigation Co's wharf which is adjacent * * *

* * * * *

All on board to be delivered.

Bills of lading, signed by the master of the ship and by shipper's agent, were issued by the vessel providing that the freight for the cargo was "to be paid, as per margin in **DESTINATION.**" One bill of lading specified in the margin "freight as per agreement" and the other "freight as agreed." Each bill of lading contained the printed provision that freight was "to be considered as earned, lost or not lost." The steamship, proceeding on her voyage was lost, with her cargo, by fire at sea. It was held that under the terms of the original arrangement or agreement payment of freight could not be obtained without delivery at Honolulu. In this connection the court said:

On the threshold of our inquiry, we find that the provision for paying the freight after the goods were delivered, contained in the original agreement, accords with the dictates of good conscience, with the doctrines of general law, and, according to one of appellant's own witnesses, "the usual and customary method of shipping nitrate cargo."

and:

If the appellee's contention is correct, and the letter should be looked to alone for time of payment, appellant can never collect the freight. If the appellant's view is sustained, it can collect its freight after a reasonable time "after the vessel should have arrived (but did not) at Honolulu."

As indicated above the decision, in effect, accepted appellee's, and rejected appellant's, views as thus expressed.

In the instant matter the original agreement, as expressed in the Government bills of lading, required, no less than did the original agreement in the case just noted, delivery before payment. Giving effect to that requirement, no right to collect freight prior to delivery could have accrued to the carrier with respect to the shipments here concerned, even in event of an actual loss of cargo and vessel. Surely no greater right accrues where there is involved only a constructive loss of vessel, the goods being transshipped to another vessel of the same carrier and delivered subsequently to the destination specified in original bill of lading.

The case of *James Richardson & Sons v. 158200 Bushels of Wheat*, 90 Fed. (2d) 607, cited in the request for review, involved facts and bill of lading conditions materially different from those involved in the present claim, and does not appear to constitute authority for the conclusion urged here.

Accordingly, the disallowance of the additional charges claimed as for a new and separate shipment from San Francisco, California, to Norfolk, Virginia, was proper and is sustained.

Respectfully,

(S) R. N. ELLIOTT,
Assistant Comptroller General
of the United States.

[COPY]

ENCLOSURE NO. 31

ASSISTANT COMPTROLLER GENERAL

OF THE UNITED STATES,

Washington, May 20, 1940.

RICHMOND, FREDERICKSBURG & POTOMAC

RAILROAD COMPANY,

Accounting Department,

Richmond, Virginia.

GENTLEMEN: There has been considered your request for review of settlement No. T-117006, February 15, 1938, under which you were allowed \$624 of the sum of \$936.15 claimed in your bill No. F-3184, for the transportation of 1,140 cubic feet of household goods, weighing 11,455 pounds, from Tientsin, China, to Quantico, Virginia, under Government bill of lading No. M-41657-37, dated May 11, 1937.

It appears that the said property was tendered to the Dollar Steamship Company who transported the shipment from Tientsin to San Francisco on the steamship *President Coolidge* and at San Francisco the shipment was transferred to the *West Mahwah* for movement via the Panama Canal to the port of Baltimore, Maryland, by the McCormick Steamship Company. After leaving San Francisco, California, the *West Mahwah* suffered damages such as to require it to be returned to San Francisco with its cargo, where the property here concerned was transferred to the steamship *Everett* of the McCormick Steamship Company, in which vessel the shipment subsequently arrived at Baltimore, Maryland, where it was transshipped by rail to Quantico, Virginia.

Insofar as is here pertinent, it appears that the shipment was accepted at Tientsin by the Dollar Steamship Line for movement to Baltimore, Maryland (en route to Baltimore, Maryland), for which a through rate of \$20 per ton of 40 cubic feet was applicable, being the rate upon which was based the amount (\$570) you have received in payment for the transportation from Tientsin to Baltimore. It is not disputed that such charges are those that would have been properly due had the shipment been transported without necessity for transfer of lading from the steamship *West Mahwah* to the steamship *Everett*. It is urged, however, that in addition to the charges so accruing and paid, the carrier is entitled to payment of additional charges in the amount of \$312.15, being charges as for a new and separate shipment from San Francisco, California, the point at which the transfer of the lading occurred, to Baltimore, Maryland, the point at which the McCormick Steamship Company delivered the shipment to the rail carrier plus certain charges incident to the transfer at San Francisco. In this connection you refer to a letter addressed to you by the General Agent of the McCormick Steamship Company, Baltimore, Maryland, dated April 12, 1938, file C-4-3, wherein it is stated in pertinent part that—

After the voyage of the SS WEST MAHWAH was abandoned, we find that we secured release in connection with this shipment granting authority to reforward on the SS EVERETT or subsequent vessel. It was thoroughly understood that we were exercising our right under the bill of lading

to earn additional freight, and it was considered that collect freight on the SS WEST MAHWAH was earned prior to the time the freight was loaded on the following vessel. * * * we can not treat Government shipments different from any others and in each and every instance, a second freight was collected when the freight was forwarded Eastbound.

The basis for the contention that under the circumstances here present the carrier is entitled, in addition to the through charges already paid, to charges of \$312.15, as for a new and separate shipment from San Francisco, apparently rests upon the following provision appearing in standard bill of lading of the McCormick Steamship Company:

3. Full freight to destination on weight or measurement at Carrier's option at declared rates (unless otherwise agreed) and all advance charges against the Goods are due and payable to the Carrier upon receipt of the Goods by the latter; and the same and any further sums becoming payable to the Carrier hereunder and extra compensation, demurrage, forwarding charges, general average claims, and any payments made and liability incurred by the Carrier in respect of the Goods (not required hereunder to be Borne by the Carrier) shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading, of the service hereunder, without deduction (if unpaid) or refund in whole or in part (if paid) Goods or Vessel lost or not lost; and the same shall be payable in United States currency, or its equivalent in local currency at Bank demand rate of exchange

on New York at Carrier's option, and the Carrier shall have a lien on the Goods or any part or proceeds for the whole thereof: and the Shipper, Consignee and/or assigns shall be jointly and severally liable therefor, and notwithstanding that any lien therefor has been surrendered. Full freight and charges shall be payable and so paid, on all damaged and unsound Goods. * * *

Apparently, it is considered that the above provision is required to be applied by reason of the fact that the Government bills of lading on which the shipments were accepted for transportation contained the provision:

Unless otherwise specifically provided hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

Thus the basis for the claim appears to be that under the above bill of lading provisions the right to payment of the full freight to the destination of the steamship *West Mahwah* was earned when the vessel discharged the cargo at San Francisco and that for the transshipment in the steamship *Everett* from San Francisco to Baltimore a right to charges as for a separate and independent shipment between those points accrued.

In the instant case the shipment was transported pursuant to the terms of a Government bill of lading which stipulated that the property therein described was received by the initial carriers concerned "to be forwarded subject to the conditions stated on the reverse hereof" from the

point of origin named therein to Quantico, Virginia, "by said company and connecting lines." The bill of lading showed the "Dollar Steamship" as the originating carrier and specified transportation via "San Francisco-McCormick Steamship Co. Baltimore, B&O. RR, Richmond, Fredericksburg & Potomac RR." Under the heading of conditions on the reverse side of the bill of lading its was provided:

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

"1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

"2. Unless otherwise specifically provided hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier."

It is further stated on the reverse of the bills of lading in paragraph 2, under the heading of "Instructions," that—

* * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. * * *

Thus, under the express provisions of condition 1, payment for the service covered by the bill of lading was to be made upon presentation of the bill of lading "properly accomplished" and it is clear from the instructions as quoted above that execution of the consignee's certificate, showing receipt of the property at destination, was necessary to the proper accomplishment of the bill of lading. The Government bill of lading, therefore, required delivery of the shipment before the right to payment of freight charges should accrue, and this provision of the contract of carriage was not altered by the fact that the carrier's commercial bills of lading may have contained a provision for payment for full freight to destination "Goods or Vessel lost or not lost." In this connection it is to be noted that condition 2 of the Government bill of lading, under which, apparently, it is claimed the shipments here concerned were made subject to the same rules and conditions as govern commercial shipments, contained the qualifying provision, "Unless otherwise specifically provided hereon." As indicated above the Government bill of lading itself provides for receipt of the goods by the consignee before payment, and any provision otherwise in commercial bills of lading of the carrier concerned would be inoperative as to the shipments here concerned.

A somewhat similar set of circumstances was involved in the case of *Toyo Kisen Kaisha v. W. R. Grace & Co.*, 53 F. (2d) 740. That case involved a shipment of nitrate of soda from Chilean ports destined to Honolulu, Territory of Hawaii.

Arrangements for the transportation had been made in January 1921 and were confirmed in letter dated January 14, 1921, from the carrier to the shipper in which appeared the following:

2500 Long tons Nitrate of Soda March shipment per *Tokuyo Maru* from Nitrate Port to Honolulu at \$7.00 per ton of 2240 lbs., gross weight delivered.

Freight payable in San Francisco on receipt of weights from Honolulu.

This cargo to be loaded according to custom of port in Chile and to be discharged at rate of 400 tons per day, 2000 tons to be discharged at railroad wharf, Honolulu, and 500 tons at Inter-Island Steam Navigation Co's wharf which is adjacent * * *

* * * * *

All on board to be delivered.

Bills of lading, signed by the master of the ship and by shipper's agent, were issued by the vessel providing that the freight for the cargo was "to be paid, as per margin in DESTINATION." One bill of lading specified in the margin "freight as per agreement" and the other "freight as agreed." Each bill of lading contained the printed provision that freight was "to be considered as earned, lost or not lost." The steamship, proceeding on her voyage was lost, with her cargo, by fire at sea. It was held that under the terms of the original arrangement or agreement payment of freight could not be ob-

tained without delivery at Honolulu. In this connection the court said:

On the threshold of our inquiry, we find that the provision for paying the freight after the goods were delivered, contained in the prior agreement, accords with the dictates of good conscience, with the doctrines of general law, and, according to one of appellant's own witnesses, "the usual and customary method of shipping nitrate cargo."

and:

If the appellee's contention is correct, and the letter should be looked to alone for time of payment, appellant can never collect the freight. If the appellant's view is sustained, it can collect its freight after a reasonable time "after the vessel should have arrived [but did not] at Honolulu."

As indicated above the decision, in effect, accepted appellee's, and rejected appellant's, views as thus expressed.

In the instant matter the original agreement, as expressed in the Government bill of lading, required, no less than did the original agreement in the case just noted, delivery before payment. Giving effect to that requirement, no right to collect freight prior to delivery could have accrued to the carrier with respect to the shipments here concerned, even in event of an actual loss of cargo and vessel. Surely no greater right accrues where there is involved only a constructive loss

of vessel, the goods being transshipped to another vessel of the same carrier and delivered subsequently to the destination specified in original bill of lading.

Accordingly, the disallowance of the additional charges claimed as for a new and separate shipment from San Francisco, California, to Baltimore, Maryland, was proper and is sustained.

Respectfully,

(Signed) R. N. ELLIOTT,
*Assistant Comptroller General
 of the United States.*

[COPY]

ENCLOSURE NO. 32

ASSISTANT COMPTROLLER GENERAL

OF THE UNITED STATES,

Washington, June 2, 1941.

ALCOA STEAMSHIP COMPANY, INCORPORATED,
17 Battery Place, New York, N. Y.

GENTLEMEN: Reference is made to your letter of April 10, 1941, concerning the question of freight charges on a Government shipment moving under a Government bill of lading, in the event of an accident en route which occasions the loss or destruction of the shipment, thereby rendering it impossible for you to furnish a receipt for the property in support of your claim for charges. In this connection, you state that the Government bill of lading by its terms is subject to the same rules and conditions which govern commercial shipments made on usual forms and

that your "usual form of Bill of Lading on South-bound cargo specifies that the freight has been prepaid and therefore is not at the risk of the steamship company." You request to be informed also whether the United States places insurance to cover freight, marine and war risks on Government cargo which moves in commercial vessels.

The jurisdiction of this office is such that a decision may not be rendered you upon the abstract questions so presented. However, with respect to the question of freight charges under conditions such as described, attention is invited to the fact that the Government bill of lading provides in condition 1 that prepayment of charges shall in no case be demanded and that payment will be made on presentation of the bill of lading properly accomplished, while the reverse side of the bill of lading contains instructions under which the consignee upon receipt of the shipment is to sign the consignee's certificate on the original bill of lading and surrender it to the carrier, which then becomes the evidence upon which settlement for the service is to be made.

Relative to your query pertaining to the matter of insuring Government property in transit, you are referred to the Government Losses in Ship-ment Act of July 8, 1937, 50 Stat. 479, as amended by the Act of August 10, 1939, 53 Stat. 1358.

Respectfully,

(Signed) R. N. ELLIOTT,
*Assistant Comptroller General
 of the United States.*

[COPY]

ENCLOSURE NO. 33

ASSISTANT COMPTROLLER GENERAL

OF THE UNITED STATES,

Washington 25, Aug. 2, 1943.

ALCOA STEAMSHIP COMPANY, INCORPORATED,

*Cargo Claim Department, 111 Broadway,**New York, N. Y.*

GENTLEMEN: Reference is made to your letter of February 17, 1943, in which you take exception to the disallowance of your bill No. Cl-91 for \$287.42 under certificate No. 1991541/2, February 6, 1943. The said amount represents deductions by Stephen J. Brune, Navy disbursing officer, under vouchers 3690, 3691 and 3692, June 5, 1942 from amounts otherwise due on bill No. NY 2731, and apparently two others, for the value of, and the unearned freight on, 13 crates of carrots, 10 crates of turnips, 15 crates of parsnips, 100 pounds of onions, and 300 pounds of potatoes, being part of a shipment of miscellaneous commodities laden aboard the S. S. *Alcoa Pilgrim* from New York, New York, to Georgetown, British Guiana, under bill of lading No. N-803919, January 15, 1942. The record indicates that the above-mentioned vegetables "perished" in transit. However, it is your contention that under the terms of your commercial form of bill of lading fresh vegetables "are received and carried at the sole risk of the owner" and, therefore, the carrier not being liable for the subject loss, the amount deducted by the disbursing officer should be paid.

With respect to the limitation of the carrier's liability as set out in the commercial form of bill of lading, it is to be observed that such limitation is valid only insofar as it might be authorized by the Carriage of Goods by Sea Act. See 46 U. S. C. A., sections 1300 and 1303 (8). Even where a bill of lading undertook to exempt the carrier from liability for damage resulting from a specific cause, as sweat, the showing of the existence of that condition alone was insufficient to relieve the carrier if it failed to provide, without excuse, adequate ventilation, or if its improper stowage contributed to the destruction of the cargo, or if it was otherwise negligent in handling the cargo. *Wessels, et al. v. S. S. Asturias, et al.*, 126 F. 2d 999.

The record does not show the ventilation accorded the shipment nor is there anything to indicate how the shipment was stowed excepting the unsupported statement of the carrier to the Navy Department July 24, 1942, that no arrangement for special stowage having been made, "The shipment in question was stowed in the 'tween deck which is, as you know, well ventilated." Accordingly, on the basis of the present record, the subject settlement is sustained.

Respectfully,

(Signed) FRANK L. YATES,
*Assistant Comptroller General of the
United States.*

[COPY]

ENCLOSURE NO. 34

ASSISTANT COMPTROLLER GENERAL

OF THE UNITED STATES,

Washington 25, June 21, 1943.

COASTWISE (PACIFIC FAR EAST) LINE,

222 Sansome Street, San Francisco, Calif.

GENTLEMEN: Reference is made to your letter of October 5, 1942, file C(PFE)LINE 33713-2, pertaining to the disallowance of your claim totalling \$4,106.56 for 3 shipments of Government property laden aboard the *S. S. Coast Merchant* in December 1941, which were covered by bills of lading Nos. JDH-M-32841-42, JDE-M-32941-42, and JDH-M-32896-42, reading from San Francisco, California, to Manila, Phillippine Islands. The said claims were disallowed by certificate No. 195996½, September 24, 1942, because the record at that time indicated tender of the shipments to the American President Lines, Limited, and, therefore, the interest of the Coastwise (Pacific Far East) Line was not apparent. You have now furnished waivers executed in your favor by the American President Lines, Limited, relinquishing that carrier's rights, title, and interest in the subject bills of lading, and the memorandum copies of the Government bills of lading indicated that they were signed in the name of the American President Lines "For the Master, and for Coastwise (Pacific Far East) Line, chartered owners of the vessel." In effect you seek payment in the aggregate amounts of \$3,796.36 for transportation, plus \$63.64 for

handling, \$38.98 for tolls, and \$207.58 for demurrage at San Francisco.

It is alleged that the shipments in question were aboard the *S. S. Coast Merchant* on voyage No. 79-W. With reference to that voyage in connection with other Government shipments, it is reported in your letter of February 11, 1942, addressed to the Bureau of Supplies and Accounts, Transportation Division, United States Navy Department, that:

S. S. Coast Merchant—This vessel started loading cargo at San Francisco December 5, 1941, for discharge at Guam and Manila. Loading was completed December 18th and after having cleared she proceeded to Naval anchorage to wait convoy, pursuant to orders of the United States Navy. As in the case of the *Coast Miller*, constant contact with the Twelfth Naval District was maintained while at anchorage waiting convoy, and finally we were ordered by the Maritime Commission to discharge the vessel's cargo at San Francisco. The vessel proceeded from the Naval anchorage to her pier and started the discharge of cargo January 2, 1942. Discharge of cargo was completed January 8, 1942, at which time the voyage was abandoned.

In addition to the statement of freight and attached vouchers, we attach hereto a photostatic copy of the order of the United States Maritime Commission to discharge the above vessels at San Francisco. As you will observe, this order was signed by E. J. Bradley, Pacific Coast Representative, Division of Emergency Ship-

ping, and for your convenience we quote the order as follows:

“UNITED STATES
MARITIME COMMISSION,
“*San Francisco, Calif., December 31, 1941.*
“COASTWISE (PACIFIC FAR EAST) LINE,
“222 Sansome Street, San Francisco,
Calif.

Re: S. S. *Coast Miller*—S. S. *Coast Merchant*.

“GENTLEMEN: Pursuant to authority granted by the laws of the United States and proclamations of the President of the United States, you are hereby directed to immediately effect discharge of the above two vessels which are both now understood to be lying at the Port of San Francisco, California, notifying us when the same has been completed and immediately the said vessels are free of cargo at said port, make them and both of them available to the United States Maritime Commission, or its nominee, for use by it, or its nominee, on a time charter basis, the terms to be hereafter arranged.

“Kindly confirm.

“Yours very truly,

“B. J. BRADLEY,
“*Pacific Coast Representative,*
“*Division of Emergency Shipping.*”

It appears that the above-mentioned charges for transportation are based upon rates from San Francisco to Manila, apparently upon the view that full freight to Manila is payable by reason of “Clause 9” of your commercial bill of lading, quoted in your letter, *supra*, in part to read—

If because of war hostilities * * *
or any other action or regulation of any

government or people * * * Carrier or Master shall deem it impossible, imprudent or * * * inadvisable to proceed to such port or to load or discharge the goods there * * *

(1) Vessel may omit to call or to load the goods at port of shipment, or having loaded may discharge them there, and carrier may: (a) store them at said port or (b) arrange for forwarding them to or toward the port of destination. * * *

The storage provided for in this clause may be in lighters or craft or on wharf or shore. * * * *Any such storage or forwarding shall be arranged by carrier in the capacity of shipper's agents and at shipper's cost and risk, and shall constitute final delivery under this contract.*

The carrier and the vessel shall have liberty to comply with any directions or recommendations * * * given by any government or local authority * * * Nothing done in compliance with any such direction or recommendation shall be deemed a deviation and *delivery or other disposition of the goods in accordance therewith shall be a fulfillment of the contract voyage.*

The letter of February 11, 1942, suggests that the delivery of the goods at San Francisco, pursuant to directions of the Government, constituted "fulfillment of the contract voyage."

The Government bill of lading, Standard Form No. 1058, embodies the following conditions, among others, to which the forwarding of the shipment covered thereby is made subject:

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

"1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

"2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier."

Also, under the caption of "Instructions," on the back of the bill of lading under paragraph 2, appears the following:

* * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. Memorandum copies of bills of lading may be used as administrative officers direct.

It is to be observed that condition No. 2 of the Government bill of lading providing that the rules and conditions of the usual forms provided by the carrier for commercial shipments is subject to the provision "Unless otherwise specifically provided or otherwise stated hereon." In this connection there is for consideration the fact that condition No. 1 of the Government bill of lading provides for payment upon presentation by the carrier of

the Government bill of lading "properly accomplished," which, in accordance with paragraph 2 of the instructions on the Government bill of lading, contemplates that "The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier."

Thus, under the express provision of condition No. 1 of the Government bill of lading, payment for the service covered by the bill of lading is to be made upon the presentation of said bill of lading "properly accomplished" which contemplates execution of the consignee's certificate of delivery thereon showing that the particular shipment was received at the destination by the consignee. In the present case it appears that the Government bills of lading indicated the "Post Quartermaster, Marine Barracks, Cavite, P. I." as the consignee and Manila, Philippine Islands, as the destination of the shipments. These shipments were not transported to the indicated destination and the bills of landing could not have been accomplished to show that fact.

However, provision has been made, in the event of loss or destruction of the original bill of lading, for the issuance by the consignor of a "Certificate in Lieu of Lost Bill of Lading," Standard Form No. 1061, which, after having been filled in by the consignor, may be furnished the carrier by the consignee, this procedure being authorized in General Regulations No. 69, August 24, 1928, 8 Comp. Gen. 695. The said certificate embraces a form of certificate for execution by the consignee showing in effect that the property was received

in good order, and that the original bill of lading has not been received nor can it be located.

The charges claimed in the present instance are supported in each instance by a "Certificate in Lieu of Lost Bill of Lading," each of which bears reference to the Government bill of lading covering the particular shipment here involved, and carries the following statement—

MATERIAL AS LISTED HEREON WAS DISCHARGED AT SAN FRANCISCO DUE ABANDONED VOYAGE BY ORDERS OF NAVY DEPARTMENT. IT IS HEREBY CERTIFIED THAT THIS MATERIAL WAS RECEIVED FROM THE COASTWISE (PACIFIC FAR EAST) LINE IN GOOD ORDER & CONDITION AT SAN FRANCISCO BY DEPOT QUARTERMASTER DEPOT OF SUPPLIES, USMC.

The "Certificate of Consignee" on the said certificates indicates the "DEPOT OF SUPPLIES, USMC" as the consignee of the shipments and is signed by W. V. Harris, Captain, U. S. M. C. Obviously, however, the Depot of Supplies, U. S. M. C. was not the consignee, nor was San Francisco, the destination of the shipments. It is apparent therefore that these certificates in lieu of lost bill of lading, which have not been signed by the consignor, do not establish the fact of receipt of the shipments as contemplated in the respective Government bills of lading. At best they appear to be mere receipts showing that the property was received at San Francisco by the Depot of Supplies, U. S. M. C. from the Coast-

wise (Pacific Far East) Line. It is equally apparent that the service called for on the Government bills of lading was not performed. As to the effect—upon the carrier's right to payment of transportation charges—of a provision in the commercial form of bill of lading inconsistent with the requirements of the contract of carriage otherwise established see *Togo Eisen Kaisha v. W. R. Grace & Co.*, 53 F. (2d) 740.

Moreover, in the absence, as here, of a valid showing otherwise, the authority of Government officials to enter into contracts is limited by section 3648 of the Revised Statutes of the United States, which in pertinent part provides that:

No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment.

* * *

This statute was intended to prevent a department from anticipating the performance of an agreement, by keeping the payment within the "value of the service." *McClure v. United States*, 19 C. Cls. 173. Accordingly, with reference to the transportation charges here involved the settlement must be, and is, sustained.

With respect to the amounts of \$63.64 for handling, \$38.98 for tolls, and \$207.58 for demurrage, at San Francisco, it appears that these charges are for services actually performed, and, there-

fore, the total amount of \$310.20 will be certified for allowance. Payment should reach you in due course.

Respectfully,

(Signed) FRANK L. YATES,
*Assistant Comptroller General
 of the United States.*

ENCLOSURE NO. 35

ASSISTANT COMPTROLLER GENERAL
 OF THE UNITED STATES,
Washington, Sep. 17, 1943.

BULL-INSULAR LINE, INCORPORATED,
Pier 5, Pratt Street, Baltimore 2, Md.

GENTLEMEN: Reference is made to your letter of January 5, 1942 (1943), file S. S. *Barbara*, V-196, San Juan B/L 25, relative to the payment of \$3.72 freight charges for a shipment of one boxed typewriter from Baltimore, Maryland, to San Juan, Puerto Rico, under Government bill of lading No. WAPR-15776, February 24, 1942, laden aboard the S. S. *Barbara*. Your bill for the amount stated and bearing the above file reference was disallowed by certificate No. 1959181 $\frac{1}{2}$, September 18, 1942, for reason that the shipment never arrived at destination owing to destruction of the vessel alleged to have been by enemy action. It is your contention that the freight is properly payable and, in support thereof, you quote certain provisions of paragraphs 11, 28, and 29 of your commercial bill of lading, a copy of which was received with your letter.

The provisions so quoted, appear, however, to relate to release of the carrier from liability for the value of property lost, etc., upon the happening of certain contingencies, among which is loss of the shipment by an act of enemies. In the present instance no claim appears to have been presented by the United States for the value of the typewriter, therefore, the quoted provisions of the commercial bill of lading are not pertinent.

The amount disallowed represented freight charges on the shipment in question and it is observed in this connection that paragraph 5 of your commercial bill of lading states—

Full freight to destination, whether intended to be prepaid or collect at destination, and all advance charges against the Goods are due and payable to Bull-Insular Line, Inc., upon receipt of the Goods by the latter * * * [and] shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading * * * Goods or Vessel lost or not lost, or if the voyage be broken up
* * *

The two covenants, however, the one to pay freight and the other to compensate for the loss of cargo, are independent. The right to freight money may depend upon and be controlled by different conditions from those effecting the loss of cargo. *Transmarine Corporation v. R. W. Kinney Co. Inc.*, 11 Pac. 2d 877; *The Pehr Upland*, 271 Fed. 340, 345.

In the present instance the contract of af-freightment was represented by the Government

bill of lading, Standard Form No. 1058, which embodies, among the provisions to which the forwarding of the shipment covered thereby is made subject, the following:

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

“1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier unless otherwise specifically stipulated.

“2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.”

Also, under the caption of “Instructions,” on the back of the bill of lading appears the following:

“2. * * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. Memorandum copies of bills of lading may be used as administrative officers direct.”

Accordingly, in the absence of express provision to the contrary, under the terms of the Government bill of lading, delivery of the ship-

ment at the port of destination was a condition precedent to the right to freight. The contract of affreightment, in effect, embodied the rules and conditions of the carrier's commercial bill of lading only to the extent that the said rules and conditions were not inconsistent with specific provisions otherwise included in or stated on the Government bill of lading. It is apparent, therefore, that the provision in the commercial bill of lading requiring the prepayment of freight in cash upon delivery of the bills of lading is inoperative in view of condition No. 1 of the Government bill of lading expressly providing that prepayment of charges shall in no case be demanded. Moreover, the stipulation in the commercial bill of lading that full freight to destination is due and payable upon receipt of the goods by the Bull-Insular Line, Inc., and "shall be deemed fully earned and due and payable to the Carrier at any stage, before or after loading * * * Goods or Vessel lost or not lost," is not consistent with the provision in condition No. 1 providing that payment of freight will be made upon presentation of the Government bill of lading "properly accomplished." See in this connection *Toyo Kisen Kaisha v. W. R. Grace & Co.* 53 F. 2d 740.

Moreover, in the absence, as here, of a valid showing otherwise, the authority of Government officials to enter into contracts is limited by section 3648 of the Revised Statutes of the United States, which in pertinent part provides that:

No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of

any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *

Under this provision payments in advance of the service rendered and supplies furnished are expressly forbidden. *The Floyd Acceptances* 74 U. S. 666. This statute was intended to prevent a department from anticipating the performance of an agreement, by keeping the payment within the "value of the service." *McClure v. United States*, 19 C. Cls. 173.

Accordingly, the disallowance of the subject claim must be, and is, sustained.

Respectfully,

(Signed) FRANK L. YATES,
Assistant Comptroller General
of the United States.

[COPY]

ASSISTANT COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington, Dec. 15, 1942.

BULL-INSULAR LINE, INCORPORATED,
Pier 5, Pratt Street, Baltimore, Md.

GENTLEMEN: You have requested the review of certificate No. 195918¹/₂, September 18, 1942, which disallowed your bill S. S. *Barbara Voy*. 196, S. J. B/L 25, for \$3.72, representing the transportation charges on 1 boxed Underwood typewriter, from Baltimore, Maryland, to San Juan, Puerto Rico, tendered to you under bill of lading WAPR 15776, February 24, 1942, the disallowance being due to lack of evidence to sup-

port the claim. You now furnish a statement signed by your assistant cashier to the effect that the vessel aboard which the shipment was loaded was destroyed by enemy action.

The Government bill of lading on which the property was shipped contemplated payment upon presentation of said bill of lading showing delivery at destination. The bill of lading does not show delivery as contemplated and the record does not establish any requirement for payment otherwise.

Accordingly, upon this record, the charges claimed were properly disallowed.

Respectfully,

(Signed) R. N. ELLIOTT,
Assistant Comptroller General
of the United States.

[COPY]

ENCLOSURE NO. 36

COMPTROLLER GENERAL OF THE
 UNITED STATES,

Washington 25, Nov. 25, 1944.

LUCKENBACH STEAMSHIP COMPANY, INCORPORATED,
120 Wall Street, New York 6, N. Y.

GENTLEMEN: There has been considered your request for a review of the settlement per certificate No. 210967, dated October 18, 1943, which disallowed \$27,069.21 of your claim, per bill 62-A, for \$29,437.75 additional to \$4,580.76 previously paid you for transportation of steel tanks, which were carried on the steamship *Andrea Luckenbach*, Trip 690-A, sailing from New York, New York, December 1, 1941.

The record shows that the shipment here concerned consisted of 11 plate steel tanks, each weighing 25,000 pounds and measuring 4,618 cubic feet, which were shipped aboard the vessel named under bill of lading WQ 3112075, consigned to Manila, Philippine Islands. Apparently, due to the outbreak of hostilities in the Far East, two of the tanks were delivered to the Port Transportation Officer, Balboa, Canal Zone, and the remainder of the ship's cargo, including the remaining nine tanks was discharged at Stockton, California. For this service you presented your bill 62 in the amount of \$34,018.51, computed on the basis of full tariff rate from New York to Manila, plus certain accessorial charges, and payment was made by J. P. Tillman, Army disbursing officer, on voucher 47405, June 11, 1942, in the amount of \$4,580.76, with the explanation:

Corrected to rates New York to Stockton, Calif. as delivery is shown at Stockton, U. S. Intercoastal Conference Tariff 1-C.

Subsequently, your claim for the difference of \$29,437.75, based on the contention that under the carrier's commercial bill of lading all freight charges are earned to original contracted destination when voyage is broken or frustrated, was disallowed by this office in certificate of settlement noted above, and freight charges based on the actual service rendered were computed as follows:

Two tanks delivered at Balboa, Canal Zone (Atlantic and Gulf-Panama Canal Conference Tariff: PB-1):

9,236 cubic feet, @ \$.31-----	\$2,803.16
Heavy Lift Charges 50,000 pounds, @ \$.75 per cwt----	375.00
Isthmus Transfer 9,236 cubic feet, @ \$1.50 per 40 cubic feet-----	346.35

Nine tanks delivered at Stockton, California (United States Intercoastal Conference Tariff 1-C) :

225,000 pounds, @ \$1.18 per cwt-----	2,655.00
Heavy Lift Charges, @ \$0.20 per cwt-----	450.00
Wharfage 41,562 cubic feet, @ \$0.25 per 40 cu. ft----	259.76
Total charges-----	6,949.27

Accordingly you were allowed the sum of \$2,368.51.

The subject Government-bill of lading stipulated the conditions of shipment and provided in pertinent part that:

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

“1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

“2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.”

The contract of affreightment here concerned was represented by the Government bill of lading, which in effect embodied the rules and conditions of the carrier's commercial bill of lading only to the extent that the said rules and conditions are not inconsistent with specific provisions otherwise included in or stated on the Government bill of lading. It is apparent, therefore,

that the stipulation in the commercial bill of lading indicated as being that "Prepaid freight is to be considered earned on receipt of the goods by the carrier and is not returnable whether goods or ship be at any time thereafter lost or not lost," is not consistent with the provision in condition No. 1 providing that payment of freight will be made upon presentation of the Government bill of lading properly accomplished. It should be observed in this connection that paragraph No. 2 of the instructions on the Government bill of lading states—

* * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. * * *

Thus, under the express provisions of condition No. 1, payment for the service covered by the bill of lading was to be made upon presentation of the bill of lading "properly accomplished" and it is clear from the instructions, as quoted above that execution of the consignee's certificate, showing receipt of the property at destination, was necessary to the proper accomplishment of the bill of lading. The Government bill of lading, therefore, required delivery of the shipment before the right to payment of freight charges should accrue, and this provision of the contract of carriage was not altered by the fact that the carrier's commercial bill of lading may have contained a provision that freight charges are to be considered as earned on receipt of goods by the carrier. See in this connection the

case of *Toyo Kisen Kaisha v. W. R. Grace & Co.*, 53 F. 2d 740.

Moreover, in the absence, as here, of a valid showing otherwise, the authority of Government officials to enter into contracts is limited by section 3648 of the Revised Statutes of the United States, which in pertinent part provides that:

No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *

Under this provision payments in advance of the service rendered and supplies furnished are expressly forbidden. *The Floyd Acceptances*, 74 U. S. 666. This statute was intended to prevent a department from anticipating the performance of an agreement, by keeping the payment within the "value of the service." *McClure v. United States*, 19 C. Cls. 179.

The charges as computed in settlement No. 210967 were based upon the tariff rates and accessorial charges incidental to movement of freight under the cited tariffs. In other words had the shipment here concerned been destined to Balboa, Canal Zone, and Stockton, California, originally on the date of shipment from New York, the total charge for transportation would have been \$6,949.27, as computed in the settlement. Accordingly, the settlement is sustained. Concerning your inquiry in letter of November 14, 1944, as to certain other shipments via this

vessel, you are advised the settlements in question are receiving attention and you will be further informed as to the disposition of the questions involved as promptly as circumstances will permit.

Respectfully,

(Signed) FRANK L. YATES,
*Assistant Comptroller General
 of the United States.*

[COPY]

ENCLOSURE NO. 37

ASSISTANT COMPTROLLER GENERAL
 OF THE UNITED STATES,
Washington, March 27, 1945.

UNITED FRUIT COMPANY,
*Freight Traffic Department,
 Pier 2, North River, New York 4, N. Y.*

GENTLEMEN: Reference is made to your letter of January 30, 1945, file 1-122, 700, 703, FA-3, relative to your claim for \$6.10 which was disallowed by certificate No. 1959121½, October 5, 1942.

The said amount represents ocean freight charges alleged to have accrued on a shipment of unexposed photographic film from Puerto Limon, Costa Rica, to New York, New York, under bill of lading No. WAPR 11543, April 1, 1942. Presumably the property was lost with the S. S. *Esparta* on voyage No. 5, March 1942, when, as stated on the bill of lading, the "*SHIP /was/ SUNK BY ENEMY ACTION.*" Therefore, the shipment not having reached the destination called for in the contract of affreightment, the claim was disallowed.

It is your contention that in accordance with the principles set forth in decisions of May 27, 1918, 24 Comp. Dec. 707, and of April 7, 1942 (S-24613), 21 Comp. Gen. 909, the subject claim should be paid on the ground that the disaster constituted an excusable failure to make delivery. Also, you direct attention to the letter of May 11, 1944 (A-24222), addressed to the War Shipping Administrator, with reference to the WARSHIP LADING form of bill of lading.

The shipment here in question was transported under the terms of a Government bill of lading and the conditions of the contract of carriage as stipulated in the said bill of lading are, in pertinent part, that:

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

“1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

“2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made by the usual forms provided therefor by the carrier.”

The form of commercial bill of lading transmitted with your letter of June 20, 1942, file 6K-122, addressed to the Claims Division of the Gen-

eral Accounting Office, and which is indicated as having been in use by the United Fruit Company at the time of this shipment, provides in clause 5, thereof that:

Full freight through to destination of the Goods, whether intended to be prepaid or collected at destination, and all advance charges against the Goods are due and payable to the United Fruit Company upon receipt of the Goods by the latter; and the same * * * shall be deemed fully earned and due and payable irrevocably to the Carrier at any stage, before or after loading * * * Goods or Vessel lost or not lost, or if the voyage be broken up, or in any circumstances whatsoever * * *.

The contract of affreightment as represented by the Government bill of lading in effect, embodied the rules and conditions of the carrier's commercial bill of lading only to the extent that the said rules and conditions are not inconsistent with specific provisions otherwise included in or stated on the Government bill of lading. It is apparent therefore that the provision in the commercial bill of lading requiring the prepayment of freight is inoperative in view of condition No. 1 of the Government bill of lading expressly providing that prepayment of charges shall in no case be demanded. Moreover, the stipulation in the commercial bill of lading that "Full freight through to destination * * * due and payable * * * upon receipt of the Goods" by the carrier;" and the same * * * shall be deemed fully earned and due and payable irrevocably to the Carrier at any stage, before or after loading * * * Goods or Vessels lost or

not * * * or in any circumstances whatsoever" is not consistent with the provision in condition No. 1 providing that payment of freight will be made upon presentation of the Government bill of lading properly accomplished, observing in this connection that proper accomplishment within the meaning of paragraph No. 2 of the instructions on the Government bill of lading contemplated that:

* * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made.

There is to be noted, also, the statutory limitation, upon payments to be made under contracts for service, imposed by section 3648 of the Revised Statutes of the United States, which provides in pertinent part that:

No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *

This statute was intended to prevent a department from anticipating the performance of an agreement, by keeping the payment within "the value of the service" *McClure v. United States*, 19 C. Cls. 173. The provision of the commercial bill of lading to the effect that freight is deemed

earned upon receipt of the property by the carrier seems clearly repugnant to the above statutory provision, which requires that, in the case of a contract for service, payment shall not exceed the value of the service rendered.

With reference to the decision of May 27, 1918, 24 Comp. Dec. 707, it is to be observed that the shipments there involved were said to have been made "subject to all clauses and conditions of bills of lading in use by steamship lines" while the subject shipment was made subject to the terms of the carrier's commercial form of bill of lading only to the extent that such terms were not in conflict with the terms of the Government bill of lading. But even in that case the decision points out very clearly that "Section 3648, Revised Statutes, prohibits payment in excess of the service rendered."

Relative to the other decision to which you have referred, B-24613, April 7, 1942, 21 Comp. Gen. 909, it is to be noted that while said decision held that in the circumstances therein indicated the furnishing of a receipt establishing delivery of the shipment into the custody of the consignee at destination would not be required, it did not hold, as apparently you consider to be the case in the instant matter, that freight charges to destination are earned upon delivery of the shipment on board the vessel for transportation. In the present instance the property never reached its destination owing, reportedly, to the destruction of the vessel by enemy action.

With respect to the letter addressed to the Administrator of the War Shipping Administration on May 11, 1944, A-24222, the matter there con-

cerned related to proposed traffic regulations pertaining to the transportation of shipments for the United States Government departments and agencies under "War Shiplading 7/1/42" forms, aboard all vessels owned by or under charter to the War Shipping Administration, the use of said forms for ocean shipments during the present emergency having been permitted by this office in a letter addressed to the Administrator on August 31, 1943, A-24222. Since the instant shipment moved under the standard form of Government bill of lading in effect at the time the shipment was made the matter here concerned is controlled by the terms of said bill of lading constituting the contract of affreightment so made. It has been pointed out hereinabove that the terms of the Government bill of lading and the provisions of section 3648 of the Revised Statutes preclude any prepayment of freight. Furthermore, it has been shown that section 3648 of the Revised Statutes precludes, also, the payment of any amount in excess of the value of the service rendered. The sum of \$6.10 alleged to be due the United Fruit Company represents charges for transportation from Puerto Limon, Costa Rica, to New York, New York, but the shipment did not reach New York as called for by the contract of affreightment and the charges so claimed were not earned. Therefore, the disallowance of your claim must be, and is sustained.

Respectfully,

(Signed) FRANK L. YATES,
*Assistant Comptroller General
of the United States.*

[COPY]

ENCLOSURE NO. 38

ASSISTANT COMPTROLLER GENERAL

OF THE UNITED STATES,

Washington, July 21, 1945.

LYKES BROS. STEAMSHIP COMPANY, INCORPORATED,
Galveston, Texas.

GENTLEMEN: Consideration has been given to your request for further consideration of your bill No. Card #53-37 for charges amounting to \$12.94, alleged to have accrued on a shipment made March 2, 1942, from San Juan, Puerto Rico, to Soney, Texas, under Government bill of lading No. Cwb-339890, which amount was disallowed by settlement certificate No. 195898¹/₂, September 17, 1942.

The subject shipment, which is said to have been laden aboard the S. S. *Cardonia*, never reached its destination owing to the alleged destruction of the vessel by enemy action. In substance, it is your contention that notwithstanding the nondelivery of the shipment you are entitled to payment of the full charges to the port of discharge in view of condition 2 of the Government bill of lading which provides that:

Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

and, by virtue of clause 18 of your usual form of bill of lading which provides, in pertinent part, that:

* * * Full freight hereunder to port of discharge named herein shall be considered completely earned on receipt of the goods by the carrier, whether the freight be stated or intended to be prepaid or to be collected at destination; and the carrier shall be entitled to all freight and charges due hereunder, whether actually paid or not, and to receive and retain them under all circumstances whatsoever ship and/or cargo lost or not lost. * * *

The contract of affreightment as represented by the Government bill of lading also provided, under condition No. 1, that:

Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

In this connection there is for noting the statement in paragraph 2 under the caption of "Instructions" on back of the bill of lading, that—

2. * * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last

carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. * * *

Thus, in the absence of an express provision to the contrary, under the terms of the Government bill of lading delivery of the shipment was a condition precedent to the right to freight. The contract of affreightment, in effect, embodied the rules and conditions of the carrier's commercial form of bill of lading only to the extent that the said rules and conditions were not inconsistent with specific provisions otherwise included in or stated on the Government bill of lading. It is apparent, therefore, that the provision in your commercial bill of lading requiring payment of the freight charges even though the goods are not transported to destination is inoperative in view of condition No. 1 of the Government bill of lading expressly providing that prepayment of charges shall in no case be demanded, etc. Furthermore, the stipulation in your commercial bill of lading that full freight to destination "shall be considered completely earned on receipt of the goods by the carrier" is not consistent with the provision in condition No. 1 providing that payment of freight will be made upon presentation of the Government bill of lading "properly accomplished." See in this connection *Toyo Kisen Kaisha v. W. R. Grace & Co.*, 53 F. 2d 740.

Moreover, in the absence, as here, of a valid showing otherwise, the authority of Government officials to enter into contracts is limited by sec-

tion 3648 of the Revised Statutes of the United States, which in pertinent part provides that:

No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *

Under this provision payments in advance of the service rendered and supplies furnished are expressly forbidden. *The Floyd Acceptances*, 74 U. S. 666. This statute was intended to prevent a department from anticipating the performance of an agreement, by keeping the payment within the "value of the service." *McClure v. United States*, 19 C. Cls. 173.

Accordingly, the disallowance of the subject claim must be, and is, sustained.

Respectfully,

(Signed) J. C. McFARLAND,
Acting Comptroller General
of the United States.

[COPY]

ENCLOSURE NO. 39

ASSISTANT COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington, August 9, 1945.

WATERMAN STEAMSHIP CORPORATION,
Mobile, Alabama.

GENTLEMEN: Reference is made to your letter of November 15, 1944, and to your bill No. A-66, relative to a claim for \$3.75 which was disallowed

by certificate No. T-217259, April 8, 1944. The said amount represents ocean freight charges alleged to have accrued on a shipment of stationery and supplies from New Orleans, Louisiana, to Rio Piedras, Puerto Rico, under Government bill of lading No. A-1270741, April 29, 1942. The property was lost, presumably through the destruction of the S. S. *Afoundria*, on the night of May 5, 1942, while en route on voyage No. 66. The "CERTIFICATE IN LIEU OF LOST BILL OF LADING" filed in support of the claim was endorsed by consignee—"Shipment not received, reported lost at sea." Therefore, as the property did not reach the destination specified in the contract of affreightment, claim was disallowed.

It is your contention as expressed in a letter addressed to the Claims Division of the General Accounting Office on April 21, 1944, that "in accordance with the usual practice full freight charges shall be considered completely earned on the shipment and the carrier is entitled to those charges whether actually paid or not and to retain them irrevocably under all circumstances whatsoever ship and/or cargo lost or not lost." Apparently, this statement was made in reliance upon the provisions in your form of commercial bill of lading in which it is stated, in pertinent part, that "Full freight to port of discharge named herein, and all charges, shall be considered completely earned on receipt of the goods by the carrier, whether the freight be stated or intended to be prepaid, or to be collected at destination; and the carrier shall be entitled to all freight and charges due whether actually paid or not, and

to receive and retain them without deduction or refund under all circumstances whatsoever, cargo damaged or undamaged, ship and/or cargo lost or not lost." In your letter of November 15, 1944, you refer to the matter of your bill No. 192 for \$3,210.22, which was paid on voucher No. 170123 of the June, 1942, accounts of Captain Stephen J. Brune, Navy disbursing officer, for freight alleged to have accrued on a shipment laden aboard the S. S. *Afoundria* on voyage No. 66, for transportation from New Orleans, Louisiana, to San Juan, Puerto Rico, under Government bill of lading N-893266, April 30, 1942. In the audit of that voucher the payment was found to have been improper and on October 23, 1943, you were requested by the Claims Division of the General Accounting office to remit the full amount paid by the disbursing officer, for the reason that delivery as contemplated by the contract of affreightment had not been effected. On November 4, 1943, in reliance upon the provisions contained in your form of commercial bill of lading, you declined to make the remittance, and on December 11, 1943, you were advised by the Claims Division that "the files in this matter be closed."

The shipment here in question was transported under the terms of a Government bill of lading and the conditions of the contract of carriage as stipulated in the said bill of lading are, in pertinent part, that:

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

1. Prepayment of charges shall in no case be demanded by carrier, nor shall col-

lection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier.

The contract of affreightment as represented by the Government bill of lading, in effect, embodies the rules and conditions of the carrier's commercial bill of lading only to the extent that the said rules and conditions are not inconsistent with specific provisions otherwise included in or stated on the Government bill of lading. It is apparent therefore that any provision of the commercial bill of lading requiring the prepayment of freight is inoperative in view of condition No. 1 of the Government bill of lading expressly providing that prepayment of charges shall in no case be demanded. Moreover, the stipulation in the commercial bill of lading that "Full Freight * * * shall be considered completely earned on receipt of the goods by the carrier" and that "the carrier shall be entitled to all freight and charges due whether actually paid or not, and to receive and retain them * * * under all circumstances whatsoever * * * ship and/or cargo lost or not lost" is not consistent with the provision in condition No. 1 providing that payment of freight will be made upon presentation of the Government bill of lading properly accom-

plished, observing in this connection that proper accomplishment within the meaning of paragraph No. 2 of the instructions on the Government bill of lading contemplates that:

* * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. * * *

There is to be noted, also, the statutory limitation, upon payments to be made under contracts for service, imposed by section 3648 of the Revised Statutes of the United States, which provide, in pertinent part, that:

No advance of public money shall be made in any case whatever. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *

This statute was intended to prevent a department from anticipating the performance of any agreement, by keeping the payment within "the value of the service." *McClure v. United States*, 19 C. Cls. 173. The provision of the commercial bill of lading to the effect that full freight charges shall be considered completely earned on receipt of the goods and the carrier to be entitled to such charges whether actually paid or not and to retain them under all circumstances whatsoever ship and/or cargo lost or not lost, seems clearly repugnant to the above statutory provision, which

requires that, in the case of a contract for service, payment shall not exceed the value of the service rendered. Concerning the matter of your bill No. 192, it may be stated that credit for the payment of \$3,210.22 has been withheld in the disbursing officer's accounts, and presumably, adjustment with the carrier will be effected by that official.

Accordingly, the disallowance of your claim must be, and is, sustained.

Respectfully,

(Signed) FRANK L. YATES,
*Assistant Comptroller General
 of the United States.*

[COPY]

ENCLOSURE NO. 40

ASSISTANT COMPTROLLER GENERAL
 OF THE UNITED STATES,
Washington, Nov. 24, 1945.

MATSON NAVIGATION COMPANY,
*215 Market Street,
 San Francisco 5, California.*

GENTLEMEN: There has been considered your request for review of settlement certificate No. 223112½, dated January 31, 1945, which disallowed your bill No. 144 for \$326.80, for charges alleged to have accrued on a shipment of 40 crates of springs for double bunks which were laden aboard the S. S. *Makua*—voyage 67-E—at Pier 8, Honolulu, Territory of Hawaii, for delivery to Kahului, Maui, Territory of Hawaii, under Government bill of Lading N-9114-43, dated October 2, 1942.

The record indicates that before sailing the vessel became disabled because of a fire which necessitated unloading the cargo and that, subsequently, the shipment here concerned was transported from Honolulu to Kahului by the Navy, under bill of lading N-9135-43, dated October 9, 1942. Thus, the shipment not having been transported by the Matson Navigation Company the subject claim was disallowed. However, it is your contention that under the terms of your commercial bill of lading which, you state, provides that "freight is earned, ship lost or not lost," the freight charges claimed should be paid, as the shipment was loaded aboard the vessel at Honolulu.

The contract of affreightment is represented by the Government bill of lading in which it is stipulated, in pertinent part, that—

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

"1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face thereof of this bill of lading, properly accompanied, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated.

"2. Unless otherwise specifically provided or otherwise stated hereon, this bill of lading is subject to the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier."

It is to be observed that the contract, in effect, embodies the rules and conditions of the carrier's commercial bill of lading only to the extent that the said rules and conditions are not inconsistent with specific provisions otherwise included in or stated on the Government bill of lading. It is apparent, therefore, that any provision of the commercial bill of lading requiring the prepayment of freight is inoperative in view of condition No. 1 of the Government bill of lading expressly providing that prepayment of charges shall in no case be demanded. Moreover, the stipulations usually found in commercial bills of lading with respect to freight being earned, "ship lost or not lost" is not consistent with the provision in condition No. 1 providing that payment of freight will be made upon presentation of the Government bill of lading properly accomplished, observing in this connection that proper accomplishment within the meaning of paragraph No. 2 of the instructions on the Government bill of lading contemplates that:

* * * The consignee on receipt of the shipment will sign the consignee's certificate on the original bill of lading and surrender the bill of lading to the last carrier. The bill of lading then becomes the evidence upon which settlement for the service will be made. * * *

There is to be noted, also, the statutory limitation upon payments to be made under contracts for service imposed by section 3648 of the Revised Statutes of the United States, which provides, in pertinent part, that:

No advance of public money shall be made in any case whatever. And in all

cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *

This statute was intended to prevent a department from anticipating the performance of any agreement, by keeping the payment within "the value of the service." *McClure v. United States*, 19 C. Cls. 173. A clause in your commercial bill of lading which provides that "freight is earned, ship lost or not lost" seems clearly repugnant to the above statutory provision, which requires that, in the case of a contract for service, "payment shall not exceed the value of the service rendered."

Accordingly, the disallowance of your claim must be, and is, sustained.

Respectfully,

(Signed) FRANK L. YATES,
Assistant Comptroller General
of the United States.

[COPY]

ENCLOSURE NO. 41

ASSISTANT COMPTROLLER GENERAL
OF THE UNITED STATES,
Washington 25, April 11, 1944.

BARBER STEAMSHIP LINES, INC.,
Whitehall Building, 17 Battery Place,
New York, N. Y.

GENTLEMEN: There has been considered your claim, per your bill No. 2-A, for \$35,270.63, in

connection with the transportation of steel tanks, 325,000 pounds, 60,034 cubic feet, on the *M. S. Torrens*, under War Department bill of lading No. WQ-3111556.

This shipment was delivered to you at Brooklyn, New York, in November, 1941, "to be forwarded subject to conditions stated on the reverse" of the cited bill of lading "to MANILA, P. I. * * * there to be delivered * * * to COMMANDING OFFICER, PHILLIPINE Q. M. DEPOT." The shipment was not forwarded to Manila and there delivered to such officer but, as shown in the bill of lading space provided for "CONSIGNEE'S CERTIFICATE OF DELIVERY," was delivered to an Army quartermaster at Los Angeles Harbor (Wilmington), California, January 17, 1942. For the transportation from Brooklyn to Los Angeles Harbor you claimed, per your bill No. 2, charges in the amount of \$39,763.75 which were computed at rates applicable for transportation from Brooklyn to Manila. Payment in the amount of \$4,493.12 was made on voucher 14349 of the May, 1942, accounts of Lieutenant Colonel J. P. Tillman, Army disbursing officer, apparently computed at rates which were applicable for the transportation of tanks from Brooklyn to Los Angeles Harbor. Your claim, per your bill No. 2-A, is for the difference of \$35,270.63.

Concerning the delivery at Los Angeles Harbor, rather than at Manila, you state—

* * * The vessel arrived at Los Angeles Dec. 4, 1941, and the loading of cargo thereat ["the balance of her cargo for intended Far Eastern ports of call"] was completed on Dec. 9, 1941 * * *

The events of Dec. 7, and thereafter are too well known to call for review here and despite every justification the Master had for an immediate determination to terminate the voyage on Dec. 7 it was not until Dec. 17 that he made the following declaration:

"In view of existing war conditions and the unlikelihood that the situation in the Pacific will improve, it is my considered judgment that to proceed from Los Angeles toward Manila would subject my vessel and cargo now on board her to danger of loss or damage. Accordingly I have decided that the cargo on board my vessel must be discharged at Los Angeles and there delivered to shippers as a complete fulfillment of the conditions of the Bills of Lading. Please so arrange."

In connection with the foregoing you refer to the "following clauses of the regular Line bill of lading," to wit:

Clause 18. All freight prepaid or payable at port of shipment shall be deemed and considered as earned on shipment of the goods or receipt of the goods by the carrier and is to be retained by the carrier, vessel or cargo lost or not lost or in case of frustration or breaking up of the voyage. * * *

Clause 25. In case of war, hostilities * * * blockade * * * warlike or naval operations, conditions or demonstrations * * * whether at or near the port of discharge * * * and whether existing or anticipated before the commencement of or during the voyage, which, in the judgment of the master, is or are likely to give rise to or result in damage

to or loss of or risk of capture, seizure or detention of * * * the vessel, or any part of the cargo, or may make it unsafe or imprudent for any reason to proceed on or continue the voyage or enter or discharge the cargo at the port of discharge * * * the vessel may, at any stage of the voyage, in the discretion of the master, either with or without proceeding further upon the voyage originally contemplated, or with or without proceeding toward * * * any port or other place or point in the course of such voyage to discharge the goods there, remain or stop at * * * any port * * * as the master may consider safe or advisable under the circumstances * * * and may also discharge or transship the cargo * * * there, and thereupon, when so landed, transshipped or discharged, the cargo shall be at the risk and expense (including all expense of transshipment) of the shipper, owner and consignee thereof, and finally delivered hereunder, and the carrier shall be freed and discharged from any further responsibility in respect thereof, and from all liability hereunder; * * * the carrier shall be entitled to a reasonable extra compensation for such services above the full Bill of Lading freight, and the shipper, consignee and cargo shall be liable to the carrier for any charges, freight and extra expense in connection therewith, and the carrier shall have a lien therefor.

You urge in effect that "Clauses Nos. 18 and 25 of the regular line bill of lading" constituted part of the "contract of affreightment" and that, accordingly, although the shipment was transported only to Los Angeles Harbor, you are en-

titled to the freight charges that were applicable for the transportation to Manila called for under bill of lading WQ-3111556.

Concerning "Clause 18" of the "regular Line bill of lading," it is to be noted that under the provisions thereof it was freight "prepaid" or freight "payable" at the "port of shipment" which was to be deemed and considered as "earned" on shipment of the goods or receipt of the goods by the carrier and which was to be "retained" by the carrier, "vessel or cargo lost or not lost or in case of frustration or breaking up of the voyage."

The freight charges were not "prepaid" in the present instance and, if they had been, such action apparently would have been "not only without authority of law, but * * * expressly forbidden by the act of January 31, 1823" (section 3648, Revised Statutes, 31 U. S. C. A. 529), which in part provided "No advance of public money shall be made in any case." See *The Floyd Acceptances*, 7 Wall. (74 U. S.) 666.

Neither were the freight charges for the service here contemplated—transportation from Brooklyn to Manila—"payable at point of shipment." See in this connection Far East Conference Freight Tariff No. 15 which named the rates applicable from Brooklyn to Manila, and provided ~~in~~ rule 2—

All * * * charges must be prepaid in the United States * * * *except on shipments of Government Cargo. [Italics supplied.]*

See, also, "conditions stated on the reverse" of War Department bill of lading WQ-3111556

and "subject to" which this property was "to be forwarded" by the Barber Steamship Lines, Inc., from Brooklyn to Manila: On "the reverse" of this bill of lading it was provided as follows:

CONDITIONS

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

"1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated."

Bill of lading WQ-3111556 was the "contract of affreightment" in the present matter and the provisions of your "regular Line bill of lading" may be given effect to the extent only that they were not inconsistent with the provisions of bill of lading WQ-3111556 and would not involve violation of law otherwise. In the present matter the indicated situation is that there was no freight "prepaid" at Brooklyn ("port of shipment"), and that there could not have been without involving both a violation of the law and an inconsistency with the conditions of bill of lading WQ-3111556. The further indicated situation is that there was no freight "payable" at Brooklyn ("port of shipment"), and assertions to the contrary would be inconsistent with both the provisions of tariff No. 15 and with the terms

of bill of lading WQ-3111556. And see, also, the further provisions of section 3648 of the Revised Statutes that—

* * * in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. * * *

This statute was intended to prevent a department from anticipating the performance of an agreement, by keeping the payment within the "value of the service," and does not apply when there is a complete performance * * *. *Ezekiel A. McClure v. United States*, 19 C. Cls. 173, 181.

The "complete performance" contemplated in the present matter was the transportation of these tanks from Brooklyn to Manila and, in view of what has been noted hereinbefore, it seems apparent that it must have been contemplated by both parties to the "contract of affreightment" (bill of lading WQ-3111556) that it was not until delivery was made or tendered at Manila or, in other words, not until "complete performance" of the contemplated service, that the United States would become liable for, and the Barber Steamship Lines, Inc., would become entitled to, the applicable freight charges for transportation from Brooklyn to Manila, such freight charges being the measure of the "value of the service rendered" when such transportation had been performed in fact. In short, therefore, the record shows a "contract of affreightment" (bill of lading WQ-3111556) which cannot be said to have re-

quired payment by the United States as for transportation from Brooklyn to Manila, or to entitle the Barber Steamship Lines, Inc., to payment as for such transportation, unless and until such transportation was performed in fact. See, in this connection, *Clifford v. Merritt-Chapman & Scott Corporation*, 57 F. 2d 1021, 1024, and *Toyo Kisen Kaisha v. W. R. Grace & Co.*, 53 F. 2d 740, 742, certiorari denied, 273 U. S. 717.

And further concerning bill of lading WQ-3111556, having always in mind section 3648 of the Revised Statutes, see *International Paper Company v. The Schooner "Gracie D. Chambers," &c.*, 248 U. S. 387—

* * * In those cases ["Nos. 449 and 450"] [*Allanwilde Transport Corporation v. Vacuum Oil Co.*, ante, 377"] we decided that the bill of lading expressed the contract of the parties and hence determined their rights and liabilities. And it is the safer reliance, the accommodation of all the circumstances that induced it. It was for the parties to consider them, and to accept their estimate is not to do injustice but accord to each the due of the law determined by their own judgment and convention, which represented, we may suppose, what there was of advantage or disadvantage as well in the rates as in the risks.

See, also *Linea Sud-Americana, Inc. v. 7,295.40 Tons of Linseed*, 108 F. 2d 755, certiorari denied, 309 U. S. 672; *Gamboa, Rodriguez, Riviera & Co., Inc. v. Imperial Sugar Co.*, 125 F. 2d 970, certiorari denied, 316 U. S. 691.

It must be concluded therefore, that payment on the basis urged by you would not be author-

ized and, accordingly, your claim, per your bill No. 2-A, may not be certified for allowance.

Respectfully,

(Signed) FRANK L. YATES,

*Assistant Comptroller General of
the United States.*

[COPY]

ENCLOSURE NO. 42

COMPTROLLER GENERAL

OF THE UNITED STATES,

Washington 25, Aug. 31, 1943.

Administrator, War Shipping Administration:

MY DEAR ADMIRAL LAND: There has been received your letter of July 3, 1943, requesting the consideration of this office with respect to the use on all ocean shipments of Government cargo of the uniform bill of lading known as "War Shiplading 7/1/42," as prescribed in General Order No. 16, issued by the War Shipping Administration July 4, 1942, and further requesting that the procedure and forms of Government bills of lading as prescribed in General Regulations No. 97, issued by this office April 13, 1943, be considered as not applicable to ocean or deep-water shipments of Government property.

It can be appreciated that the use of the above-mentioned special bill of lading would bring about uniformity and possibly simplify administrative procedure, since it is understood that the bill of lading on all ocean shipments is prepared at the port of embarkation by the agent of the steamship company who requires that all privately-owned property be shipped on the "War

Shiplading 7/1/42." It is also understood that, with respect to shipment of Government property, all of the Government agencies are requiring the use of the proposed Government bill of lading form whereas certain others, particularly subsidiary corporations of the Reconstruction Finance Corporation, use the "War Shiplading 7/1/42," resulting in a further lack of uniformity.

In view of the fact that ocean shipments are of a special class controlled by the War Shipping Administration, as the carrier, with the several peace-time steamship companies acting as agents therefor, and in order to accomplish the desired uniformity, this office will not object to the use of the "War Shiplading 7/1/42" form for the duration of the present emergency, on ocean shipments of Government property, imports or exports, by all Government agencies, in lieu of the U. S. Government Bill of Lading, Standard Form No. 1103, as prescribed in General Regulation No. 97. However, in billing the Government agencies for the charges for such ocean shipments, it will be necessary that the War Shipping Administration, as carrier, use the Public Voucher for Transportation, Standard Form No. 1113, attaching thereto the original of the "War Shiplading 7/1/42" form in support of the said voucher and follow the procedure for the billing of freight transportation charges prescribed in the above-cited general regulations.

It should be understood that the term "ocean shipments" as herein used does not include coastwise shipments, which come within the class of interstate commerce, and furthermore, that shipments of Government property from within the

United States to oversea destinations must move on the standard Government bill of lading form to the port of embarkation, and thence to the oversea destination on the "War Shiplading 7/1/42" form. Likewise, imports must move from the port of debarkation to the destination within the United States on the standard Government bill of lading form.

Sincerely yours,

(Signed) LINDSAY C. WARREN,
Comptroller General of the United States.

[COPY]

ENCLOSURE NO. 43

COMPTROLLER GENERAL

OF THE UNITED STATES,

Washington 25, May 11, 1944.

Administrator, War Shipping Administration:

MY DEAR ADMIRAL LAND: There has been received your letter dated March 9, 1944, reference W. J. T., transmitting draft of proposed Traffic Regulation No. 7-A-Operations Regulation No. 44-A, pertaining to all vessels owned by or under charter to the War Shipping Administration and covering transportation services provided for United States Government departments and agencies on such vessels. The approval of this office is requested to the procedure in the proposed regulations, particularly the following points:

1. That the accomplishment of the War Shiplading by the receiver of the goods is not necessary as a condition to the collection of the freight charges.

2. That the transportation voucher, Standard Form No. 1068 or Standard Form No. 1113, be supported by a freight bill and a certified copy of the on-board bill of lading.

3. That Government agencies, other than those for which cargo is carried free, shall guarantee to the War Shipping Administration the payment of transportation charges on inward shipments.

4. That claims for loss or damage to cargo shall be handled in accordance with prescribed inter-departmental claims agreements and the amount of such claims shall not be deducted from freight charges.

In prescribing the use of the War Shiplading 7/1/42 for ocean shipments by office letter of August 31, 1943, A-24222, full consideration was given to the commercial international maritime agreement of long standing that transportation charges are earned and payable, or payment to be properly guaranteed, on lading, ship or cargo lost or not lost. It was understood that such practice necessitated the inclusion of the following wording in paragraph 15 of the terms of the War Shiplading:

Full freight shall be paid on damaged or unsound goods. Full freight hereunder to post of discharge named herein shall be considered completely earned on shipment whether the freight be stated or intended to be prepaid or to be collected at destination; and the Carrier shall be entitled to all freight and charges due hereunder, whether actually paid or not, and to receive and retain them irrevocably under all circumstances whatsoever ship and/or cargo

lost or not lost or the voyage broken up or abandoned.

Under such terms it would appear that the accomplishment of the bill of lading by the receiver of the goods is not a condition necessary to the collection of the freight charges since such charges are earned and payable on loading. By the same reasoning, the payment of the freight charges does not constitute payment in advance of services rendered since the accomplishment of the certificate hereinafter prescribed, on the copy of the on-board bill of lading may be accepted as prima facie evidence that the cargo was loaded and freight charges earned. Commercial shippers, generally, cover the transportation charges by insurance and as it has been held that the Government should be its own insurer, there appears to be no reason why the Government should deviate from the uniform maritime practice in the payment of freight charges, particularly under present ocean shipping conditions.

With respect to the billing of the transportation charges, it is desirable that Standard Form No. 1113 be used exclusively since the old transportation voucher, Standard Form No. 1068, is now reserved for use only in the billing of the old Government bill of lading, Standard Form No. 1058, which will be discontinued by all departments after June 30, 1944. In support of the transportation charges as billed in Standard Form No. 1113, there should be attached the original of the freight bill and a certified copy of on-board bill of lading (War Shiplading 7/1/42). It will be necessary, however, that the copy of the

on-board bill of lading be certified by typing or otherwise applying the following wording to which the designated employee of the steamship company acting as agent for the War Shipping Administration shall affix his autographic signature:

I certify that this document is a true and correct copy of the original on-board War Shiplading under which the goods herein described were loaded on the above-named vessel and that the original and all other copies thereof have been clearly marked as not to be certified for billing.

Agent for War Shipping Administration.

At the time the one copy is so certified, it will be necessary that all other copies and the original of the same War Shiplading be marked with the notation "This document must not be certified for billing since one other copy has already been so certified", in order to provide an additional safeguard against duplicate payments due to the erroneous certification of another copy of the same bill of lading. It is understood that there will be maintained in the departments to be billed and the War Shipping Administration further controls, to prevent duplicate payments, based particularly on the name of the vessel and the voyage number.

In view of the adoption of the above procedures and the provisions of section 207 of the Merchant Marine Act 1936, as amended, this office will interpose no objection to Government agencies, other than those for which cargo is carried free, guaranteeing to the War Shipping Administration the payment of transportation charges on such inward shipments as are determined to be properly chargeable to an appropriation of the particular agency. Furthermore, it can be appreciated that large amounts of revenue necessary for operation may be tied up pending determination of claims for loss or damage to cargo and this office will not require that such claims be collected by deductions from freight charges.

Subject to the above-requested changes and comments, the proposed Traffic Regulation 7-A—Operations Regulation 44-A, relating to cargoes of Government agencies transported on War Shipping Administration ships, are approved for the duration of the present emergency and for such time thereafter as this office may determine the need exists for specific procedures in connection with ocean shipments.

It is requested that when published two copies of the regulations be furnished this office.

Sincerely yours,

(Signed) LINDSAY C. WARREN,
Comptroller General of the United States.

[COPY]

ENCLOSURE NO. 44

COMPTROLLER GENERAL OF

THE UNITED STATES,

Washington 25, Oct. 12, 1944.

BARBER STEAMSHIP LINES, INC.,

Whitehall-Building, 17 Battery Place,

New York 4, N. Y.

GENTLEMEN: There has been received letter of your Vice-President, dated September 20, 1944, referring to office letter of May 11, 1944, A-24222, which was reproduced and circulated by the War Shipping Administration as Appendix "A" To Traffic Regulation No. 7-A, Operations Regulation No. 44-A of the War Shipping Administration, dated August 30, 1944. The letter of your Vice-President is in part as follows:

While your letter pertains to "all vessels owned by or under charter to War Shipping Administration and covering transportation services provided for United States Government Departments and Agencies on such vessels", we assume—but would thank you for your confirmation—your remarks would have equal application to transportation services provided for United States Government Departments and Agencies on vessels other than those owned by or under charter to War Shipping Administration.

If you confirm the correctness of our supposition, may we understand that the bill of lading form of the Line or Vessel involved in a given transport will be acceptable to you in place of the Government Bill of Lading Form heretofore used to

cover the transportation of cargo tendered for shipment by United States Government Departments and Agencies; also, that said Line or Vessel bill of lading need not be accomplished as a pre-requisite to the payment of applicable ocean freight charges, etc.

It is presumed that you have reference to foreign vessels and in particular the Norwegian vessels for which it is understood your line acts as agents, and since it was stated in office letter of May 11, 1944, A-24222, that there appears to be no reason why the United States Government should deviate from the uniform maritime practice of long standing in the payment of freight charges, you are advised that the assumption stated in the first paragraph quoted above is correct. Accordingly, the departments and agencies of the Government are authorized to make payment of ocean transportation charges to ship lines under the same procedure as heretofore approved for payments to the War Shipping Administration as agent for the ship lines of the United States, provided that such services were contracted for under similar terms and conditions.

With respect to the form of bill of lading, it will be expected that wherever practicable the Warship lading approved for the War Shipping Administration will be used, or a form incorporating the same terms and conditions, and in the interest of uniformity the billing thereof should be, if possible, on Standard Form No. 1113, supported by the original of the freight bill and a certified copy of the on-board bill of lading. Such copy of the on-board bill of lading

must bear the same certificate prescribed by this office for the copy of the on-board Warshiplading and the other copies marked as likewise prescribed. Accordingly, it may be understood that the accomplishment of the ship company or vessel bill of lading by the receiver of the goods is not a prerequisite to the payment of the applicable ocean freight charges, provided that such ocean bill of lading is otherwise correct and in accordance with the conditions and procedure herein prescribed.

It should be noted, however, that Traffic Regulation No. 7-A, Operations Regulation No. 44-A of the War Shipping Administration and the Warshiplading form of ocean bill of lading were approved in office letter of May 11, 1944, for the duration of the present emergency and for such time thereafter as this office may determine the need exists for specific procedures in connection with ocean shipments, and you are advised that this same condition of approval must apply to the procedure herein approved for ocean bills of lading other than the Warshiplading.

Respectfully,

(Signed) LINDSAY C. WARREN,
Comptroller General of the United States.

ENCLOSURE NO. 45

BARBER STEAMSHIP LINES, INC.,
New York 4, N. Y., October 31, 1944.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D. C.

S. S. *Siranger*—Voyage No. 5-A transportation vouchers—ocean freight cargo shipped under Government form of bill

of lading vessel lost by enemy action while enroute to bill of lading destination.

SIR: We attach the following:

1. Photostat of letter of United States Maritime Commission, Washington, D. C., dated August 19th, 1944, rejecting invoices for ocean freight charges in the amounts of \$241.50, \$270.20 and \$272.90, on the ground that delivery of goods to consignee is a condition precedent to demand for payment of freight.
2. Photostat of our letter to United States Maritime Commission, dated August 30th, 1944, excepting to rejection of ocean transportation invoices by United States Maritime Commission.
3. Photostat of our letter to United States Maritime Commission, dated September 11th, 1944, stating further exceptions to the rejection of invoices hereinabove referred to.
4. Photostat of letter of War Shipping Administration, Washington, D. C., dated October 4th, 1944 (evidently written on behalf of United States Maritime Commission) reiterating denial of responsibility for payment of ocean freight charges, indicating a privilege to appeal to you from said decision.

The attachments serve, we think, to fully describe the position and we respectfully request they be reviewed by your goodself and that you authorize the acceptance of our vouchers as representing proper charges against the United States Maritime Commission, as Shipper.

Yours very truly,

BARBER STEAMSHIP LINES, INC.,
JAS. B. YOUNG, *Vice President.*

Refer to C-3

UNITED STATES MARITIME COMMISSION,

Washington, August 19, 1944.

BARBER STEAMSHIP LINES, INC.,

17 Battery Place, New York 4, N. Y.

Subject: Transportation Vouchers—Ocean
Freight—S. S. *Siranger*.

GENTLEMEN: Your public voucher forms submitted for payment in the amounts of \$241.50, \$270.20, and \$272.90, covering ocean freight transportation on shipments of operating equipment from New York to Lagos, Nigeria and Takoradi on the S. S. *Siranger*, are returned herewith.

In accordance with an opinion by our Legal Division, payment of freight in this instance, under the terms of the Government bill of lading and the Comptroller General's decision, is not authorized. The Government form bill of lading by clause 1 expressly provides that delivery of the goods to the consignee is a condition precedent to payment of freight, and by clause 2 incorporates a provision contained in another document to the effect that freight is irrevocably earned on shipment, ship or cargo lost or not lost. Since the two clauses are directly contradictory, the rule of construction is that the specific clause contained within the four corners of the contract will prevail over a clause, where, in order to determine

its provisions, reference de hors the contract must be made.

Accordingly, we are unable to process the subject vouchers for payment.

Very truly yours,

A. C. WALLER,
General Auditor.

Attachments (3).

AUGUST 30, 1944.

United States Maritime Commission, Washington, D. C.:

Att: Mr. A. C. Waller, General Auditor.

Transportation Vouchers—Ocean Freight S. S. *Siranger*—Your Ref. C-3.

DEAR SIR: We acknowledge receipt of your letter of the 19th instant and regret to note therefrom you do not consider yourselves liable for the payment of the freight charges therein stated and that you consider Clause I of the Government form of Bill of Lading supersedes the conditions of the Line Bill of Lading which, we assert, were definitely incorporated in the Government form of Bill of Lading by reference.

We do not find ourselves in agreement with your conclusion.

It is quite inconceivable to us that any Governmental Department shipping cargo under the Government form of Bill of Lading, should, by reason of the Carrier being required by law to

abstain from demanding prepayment of freight, as is the case with all commercial shippers, consider that privilege formulates a proper basis for declining to pay said freight when circumstances attending the voyage render impossible the delivery of the cargo at the intended destination.

Quite apart from the above, we should like to point out that each of the bills of lading here concerned bear a special rubber stamp clause reading as follows:

Subject to all the terms, conditions and exceptions of the Line's regular form of bill of lading, and where any conflict occurs between this form and the Line form the latter's terms, conditions and exceptions are to govern.

We submit that the special clause, which we assume you did not have knowledge of as of the time you wrote your letter under reply, constitutes a contractual agreement on your part that the terms and conditions of the Line Bill of Lading supersede those of the Government form of Bill of Lading.

We request your further consideration in the light of the statements herein made and, meanwhile, we reserve all rights the S. S. *Siranger* and/or her Owners may have in the premises.

Yours truly,

BARBER STEAMSHIP LINES, INC.,

/ Vice President.

SEPTEMBER 11, 1944.

*United States Maritime Commission,
Washington, D. C.:*

Atten: Mr. A. C. Waller, *General Auditor.*

Transportation Vouchers—Ocean Freight

S. S. Siranger—Your Ref. C-3.

DEAR SIR: Please be referred to our letter of the 30th ultimo reply to which is now awaited.

Meanwhile, we assume you are familiar with Traffic Regulation No. 7-A and Operations Regulation No. 44-A, joint issue, of War Shipping Administration, dated August 30th, 1944, which has as Appendix "A" a letter of the Honorable Lindsay Warren, Comptroller General of the United States, dated May 11th, 1944, wherein, among other things, the Comptroller General says:

In prescribing the use of the War Ship-lading 7/1/42 for ocean shipments by office letter of August 31, 1943, A-24,222, full consideration was given to the commercial international maritime agreement of long standing that transportation charges are earned and payable, or payment to be properly guaranteed, on loading, ship or cargo lost or not lost. It was understood that such practice necessitated the inclusion of the following wording in paragraph 15 of the term of the War Shiplading:

"Full freight shall be paid on damaged or unsound goods. Full freight hereunder to port of discharge named herein shall be considered completely earned on shipment whether the freight be stated or in-

tended to be prepaid or to be collected at destination; and the Carrier shall be entitled to all freight and charges due hereunder, whether actually paid or not, and to receive and retain them irrevocably under all circumstances whatsoever ship and/or cargo lost or not lost or the voyage broken up or abandoned."

Under such terms it would appear that the accomplishment of the bill of lading by the receiver of the goods is not a condition necessary to the collection of the freight charges since such charges are earned and payable on loading. By the same reasoning, the payment of the freight charges does not constitute payment in advance of services rendered since the accomplishment of the certificate hereinafter prescribed on the copy of the on-board bill of lading may be accepted as prima facie evidence that the cargo was loaded and freight charges earned. Commercial shippers, generally, cover the transportation charges by insurance and as it has been held that the Government should be its own insurer, there appears to be no reason why the Government should deviate from the uniform maritime practice in the payment of freight charges, particularly under present ocean shipping conditions.

While the quotation makes reference to War Shiplading 7/1/42 in use as to vessels owned by or under charter to the War Shipping Administration, the conclusions stated as to it would appear to unquestionably have application to other forms of bills of lading containing a similar clause or one in language of the same effect in that it is hardly likely one set of rules would apply to cargo shipped in vessels owned by or

under charter to War Shipping Administration and another to vessels not so owned or chartered, when the contractual conditions are similar.

We think it of particular importance and interest that the Comptroller General of the United States recognizes the propriety of the provision universally employed in the bills of lading to the effect the "transportation charges are earned and payable, or payment to be properly guaranteed, on loading, ship or cargo lost or not lost" and, further, "that the accomplishment of the bill of lading by the receiver of the goods is not a condition necessary to the collection of the freight charges since such charges are earned and payable on loading". The latter is further amplified by the Comptroller's reasoning that "the payment of freight charges does not constitute payment in advance of services rendered since the accomplishment of an on-board certificate in the bill of lading is acceptable as prima facie evidence the cargo was loaded and freight charges earned".

The above is offered as in further support of our contention that the withholding of freight moneys from *S. S. Siranger* for the reason cargo concerned was not physically delivered at bill of lading destinations is improper in that it is neither in accord with the conditions of the contract of affreightment under which cargo is accepted for shipment nor the commercial international maritime agreement of long standing that said charges are earned and payable on loading, ship or cargo lost or not lost.

Quite apart from the above, we maintain the position stated in our letter of August 30th, i. e. that the terms and conditions of the Line bill of

lading supersede anything in conflict therewith which may appear in the printed condition of the Government bill of lading, by reason of special clause to that effect which was pressed upon the Government bills of lading here involved.

We would thank you to write us at your earliest convenience.

Yours very truly,

BARBER STEAMSHIP LINES, INC.,

Vice President.

WAR SHIPPING ADMINISTRATION,

Washington 25, D. C., October 4, 1944.

BARBER STEAMSHIP LINES, INC.,

Whitehall Building, 17 Battery Place,

New York 4, N. Y.

Subject: Transportation Vouchers—Ocean
Freight S. S. *Siranger*.

GENTLEMEN: Reference is made to our letter of September 21, 1944, and your reply thereto of September 25, and previous exchange of correspondence concerning ocean freight transportation on shipments of operating equipment from New York to Lagos and Takoradi.

As informed you, we submitted copies of your letters of August 30 and September 11, to our Legal Division for further review and decision, and we are now in receipt of advice to the effect that the information conveyed to you in our letter of August 19, is controlling. However, you have the liberty, of course, to submit the question to the Comptroller General of the United States for a decision.

In order that you may be thoroughly familiar with the position of our General Counsel with respect to this subject we quote herewith the following:

Barber Lines' letter of September 11 quotes at Length the Comptroller General's letter of May 11. A copy of the Comptroller General's letter in question is attached to Traffic Regulation 7-A—Operations Regulation 44-A. That letter does contain considerable language which seems to favor the carrier's right to retain freight after the cargo is loaded even though the vessel or cargo may thereafter be lost. That language involved a situation where WARSHIPLADING only would be used and there would not be any clause involved such as Clause 1 of the Government Form Bill of Lading. That letter therefore could not be taken to mean that the Comptroller General would no longer adhere to the opinion reported in 21 DCG 909 which involved a shipment under a Government Bill of Lading incorporating a carrier's regular form bill of lading.

Barber Lines' letter of August 30 points out that in the present case the Government Bill of Lading in addition to the regular printed incorporating clause (Clause 2) contained the following stamped provision.

Subject to all the terms, conditions and exceptions of the Line's regular form of bill of lading, and where any conflict occurs between this form and the Line's form the latter's terms, conditions and exceptions are to govern.

If that stamped clause is valid and would be given effect, the conclusion stated in our memorandum of August 9 would be correct. However, I question whether the Comptroller General would permit the use of or give effect to such a stamped provision. Nowhere in the Comptroller General's Regulations is any authority given to change any terms of the contract or add new terms or to make any notations except of course such matters as the name of the ship, the name of the shipper, description of the goods, etc. Section 8 which prescribes such matters as the size, color of the paper and other details of the Government Form Bill of Lading, provides that "no departure from the exact specifications of the standard bill of lading forms herein approved will be permitted, * * *." Obviously a provision of the contract is of considerable more importance than such matters of form as the size of the bill of lading. Moreover, a further provision in respect to the form of transportation vouchers provides that "* * *" in reproducing the said voucher forms outside the Government Printing Office the exact size, wording, and arrangement as approved by the Comptroller General of the United States must be adhered to. * * * Accordingly, I question whether the stamped clause is valid.

We suggest that in the event you are not in accordance with the findings as indicated, that you accordingly present your case to the Comptroller General of the United States.

Very truly yours,

V. T. HARFORD,
Assistant General Auditor,
Voyage Accounts.

ENCLOSURE NO. 46

Circular No. 7

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF TRANSPORTATION,
Washington, D. C., January 22, 1943.

Prepayment of Ocean Freight on Ships of Foreign Registry.—1. The following instructions from the Commanding General, Services of Supply to the Chief of Transportation dated January 9, 1943 are published for the information and guidance of all concerned:

1. Pursuant to authority contained in Executive Order 9001 and to the delegation of authority contained in instrument dated September 15, 1942 from the Under Secretary of War to the Commanding General, Services of Supply, it is hereby directed that notwithstanding provisions to the contrary contained in Government bills of lading, ocean freight charges on cargoes to overseas destinations carried in vessels of foreign registry, not chartered by, controlled by, nor operated by the War Shipping Administration, shall be due and payable after the completion of the loading of the cargo on board the vessel for shipment to the consignee.

2. The above action is predicated upon a finding by me that under the circumstances involved, this procedure is necessary to and will facilitate the successful prosecution of the war effort.

2. Transportation Officers when called upon to handle overseas shipments of the above character will observe the foregoing by causing the follow-

ing entry to be placed on Government bills of lading relating to the above cargoes:

The ocean freight charges hereon stated are now ~~due~~ and payable, cargo being aboard vessel for shipment to consignee, and necessity for prepayment having been determined by Commanding General, Services of Supply acting under Executive Order 9001 as necessary to and will facilitate the successful prosecution of the war effort.

3. To expediate the prepayment of ocean freight charges, the bills of lading prepared as above will be presented to the nearest Finance Officer, U. S. Army for settlement. The Chief of Finance advises the disbursing officers concerned have been informed of the procedure directed herein.

4. The correct project number to be used to cover the above charges is "466—Commercial Transportation by Water".

C. P. GROSS,

Major General, Chief of Transportation.

Official:

CLIFFORD STARR,

Lt. Colonel, Transportation Corps,

Chief, Administrative Division.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 271

ALCOA STEAMSHIP COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**BRIEF OF STOCKARD STEAMSHIP CORPORATION
AS AMICUS CURIAE**

HAROLD S. DEMING,
80 Broad Street,
New York 4, N. Y.,
*Counsel for Stockard Steamship Corporation
as Amicus Curiae.*

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1949

No. 271

ALCOA STEAMSHIP COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**BRIEF OF STOCKARD STEAMSHIP CORPORATION
AS AMICUS CURIAE**

Statement

Stockard Steamship Corporation has a vital interest in the decision of the instant case. That decision will largely determine the outcome of a suit in the Southern District of New York, brought by Stockard Steamship Corporation for \$73,408.52 for compensation admittedly due from the United States under a general agency contract, but withheld so as to be applied against sums allegedly overpaid by the United States to Stockard on account of freight moneys earned under previous transportation contracts.

\$70,458.42 of the amount so withheld represents freight previously paid by the United States under a contract of affreightment for the carriage of army cargo aboard the s/s William J. Salman, which was lost by enemy action before the cargo could be delivered.

This cargo, like that in the instant case, was shipped under the standard government form of bill of lading, and the Stockard form of bill of lading incorporated therein by reference contained provisions regarding the time when freight is earned substantially identical with those construed by the court below in the instant case.

Payment of the freight on this shipment was made by the United States without question pursuant to what had been the long-settled interpretation by the government of the applicable provisions of the bill of lading.

Subsequently the government, on the basis of the same contentions put forward in the instant case, reversed its position and recouped from moneys admittedly due to Stockard the freight previously unquestioningly paid.

The Issue

The issue raised is whether the government as a shipper is *specifically* exempt under the terms of the standard government bill of lading from the customary liability of shippers for freight where delivery of the cargo has been prevented by causes for which the carrier is not liable, where such freight liability is specifically provided for in the carrier's form of bill of lading incorporated by reference in the contract of carriage.

ARGUMENT

A court should not hold, except on the basis of a clear and specific contractual provision, that the government as a shipper is exempt from the customary liability of shippers for freight where delivery of cargo has been prevented by causes for which the carrier is not liable, where such freight liability is specifically provided for in the carrier's form of bill of lading incorporated by reference in the Contract of Carriage.

I

The liability of shippers for freight where delivery of the cargo at destination is prevented by an excepted cause is a matter of longstanding commercial custom.

The provision in the carrier's bill of lading that full freight "shall be deemed fully earned and due and payable to the Carrier * * * Goods or Vessel lost or not lost" is of course one longstanding in the steamship business. Under this clause alone there is no doubt that recovery would be permitted the petitioner under the circumstances of the present case, as well as those of the pending Stockard suit. As cogently pointed out in the dissenting opinion in the court below, the general maritime rule that freight is not earned until delivery has no bearing where there is an agreement to the contrary. On the basis of this standard agreement specifically incorporated in the government bill of lading the petitioner, as well as Stockard Steamship Corporation and many other steamship companies, has made all its agreements and commitments including those with the government. To hold that this established agreement is not effective when the government is the shipper would operate as a great hardship on those companies—a hardship which they had no reason to anticipate or provide against.

II

The government itself over a period of many years recognized its obligation, in common with other shippers, and paid full freight when delivery of cargo at destination was prevented through an excepted cause.

The government, which of course drew its standard form of bill of lading, recognized over a period of many years its obligation like any other shipper to pay full freight even though the cargo is lost from a cause for which the car-

rier is not responsible. In an opinion rendered in 1918 by the Comptroller of the Treasury to the Secretary of the Navy the principle was unmistakably stated:

"The liability of the Government for freight charges would therefore arise when the shipment is actually made, whether delivered to the destination or lost with the destruction of the vessel." 24 Dec. Comp. Treas. 707 (1918).

The Comptroller General in April, 1942, subsequently approved this opinion (21 Comp. Gen. 909, 913 [1942]).

The government thus adopted and acted upon over a period of many years an interpretation directly opposed to that for which it now contends. This longstanding interpretation and policy strongly reinforces our conviction that such interpretation is, in fact, the only natural interpretation of the language of the government bill of lading, which accords with the long-established commercial custom for *all* shippers. It indicates unmistakably that this was in fact the interpretation intended by the government when it drew the bill of lading. The harsh results to the steamship companies when they contracted in reliance on the accepted interpretation impose on the government a heavy burden of proof to justify its sudden and belated reversal of position.

III

The settled rule that a document is to be construed against the party which draws it is here buttressed by a provision in the government bill of lading itself that the customary liabilities imposed by the carrier's bill of lading shall govern unless otherwise specifically provided.

The action of the court below in sustaining the government's sudden reversal of position and its present con-

tention that unlike any private shipper it is exempt under its form of bill of lading from the customary liability for freight, even though delivery of the cargo at destination is prevented by an excepted cause, is directly contrary to firmly accepted standards of interpretation. The decision of the court below emphasizes the power of the government to exempt itself from the customary obligations regarding freight. Because the government *could*, the court below infers that it *intended* to and *did* do so. On the contrary, the fact that the government itself drew the controlling bill of lading and could draw it on its own terms means under settled principles of construction that the bill of lading must be construed in the case of any ambiguity *against* the government.

The necessity of such a normal construction is of course greatly emphasized where the bill of lading drawn by the government itself provides that the clauses of the carrier's bill of lading shall govern unless otherwise *specifically* provided.

It is respectfully submitted that this provision in the government bill of lading taken in conjunction with the longstanding and customary commercial liability recognized over a great many years by the government itself when it paid freight under the circumstances of this case imposes on the government a very heavy burden of proof to support its present violent and sudden reversal of position.

It is further submitted that the arguments in the brief for the petitioner, Alcoa Steamship Company, Inc., as well as the opinion of the District Court and the dissenting opinion in the court below conclusively demonstrate that the burden of proof resting on the government cannot be and has not been sustained.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be reversed and that of the District Court should be affirmed.

Respectfully submitted,

HAROLD S. DEMING,
80 Broad Street,
New York 4, N. Y.,

*Counsel for Stockard Steamship Corporation
as Amicus Curiae.*

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 271.

ALCOA STEAMSHIP COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION AND CONSENT TO FILE BRIEF AS *AMICUS*
CURIAE AND BRIEF OF WATERMAN STEAMSHIP
CORPORATION AS *AMICUS CURIAE*.

L. DE GROVE POTTER,

*Counsel for Waterman Steamship Corporation
as Amicus Curiae.*

CLEMENT C. RINEHART

WALTER P. HICKEY,

Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 271.

ALCOA STEAMSHIP COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF as *Amicus Curiae*.

Upon the annexed consent of counsel for the respective parties hereto, the undersigned, as counsel for Waterman Steamship Corporation, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae*.

L. DE GROVE POTTER,
Counsel for Waterman Steamship
Corporation as *Amicus Curiae*.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1949.

No. 271.

ALCOA STEAMSHIP COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CONSENT TO FILING BRIEF AS *Amicus Curiae*.

The undersigned counsel for the respective parties hereto consent to the filing of a brief as *Amicus Curiae* by L. de Grove Potter, as counsel for Waterman Steamship Corporation.

Dated: November 8, 1949.

MELVILLE J. FRANCE,
Counsel for Alcoa Steamship Company

PHILIP B. PERLMAN,
Solicitor General of the United States.

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 271.

ALCOA STEAMSHIP COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF AS *AMICUS CURIAE* ON BEHALF OF WATERMAN STEAMSHIP CORPORATION.

STATEMENT.

Because of its interest in the question presented, as outlined in its brief submitted as *amicus curiae* on the Petition for Certiorari, Waterman Steamship Corporation submits this brief in support of the contention of the petitioner that it is entitled to ocean freight under such circumstances as here involved.

The essential facts are that the Government shipped cargo on petitioner's vessel under the Government form bill of lading which incorporated the terms and conditions of the carrier's usual form. During the voyage the vessel was torpedoed and sunk. As a result the cargo was lost and not delivered to destination.

THE QUESTION PRESENTED.

The question presented is whether the terms of the Government form bill of lading, use of which is necessary in the carriage of Government cargo, whether by land or by sea, exempt the Government from the liability for freight which private shippers almost invariably are under when a carrier of the cargo to destination is prevented by causes for which the carrier is not responsible. The determination of the question depends on the proper interpretation of the Government form of bill of lading read in conjunction with the customary provision appearing in commercial bills of lading of ocean carriers that freight is earned on shipment of the goods, such customary provisions being incorporated by reference into the Government bill of lading as part of the contract of carriage.

THE IMPORTANCE OF THE QUESTION.

The importance of the questions raised transcends the rights and liabilities of the parties presently before the Court. The Government form bill of lading in question is one which all carriers are required to adopt in the transportation of Government cargo. For many years the Government has considered that under documents such as here involved it was liable for freight even though the carrier was unable to deliver the cargo. 24 Dec. Comp. Treas. 707 (1918) and 21 Comp. Gen. 909 at 913 (1942). Ocean carriers have been guided accordingly in establishing rates and arranging insurance. The transportation of Government cargo heretofore has followed the usual commercial practices involving the same incidents as exist in transporting cargo of private shippers by sea.

By now reversing its position the Government seeks favored treatment and, if successful, ocean carriers generally will be required to revise rate structures and insurance coverage.

Certainly, in view of this background, the Court should not overthrow what has been the well established and the customary basis on which both commercial and Government cargoes have been carried by sea for many years past unless the contract of the parties clearly requires so doing. It is submitted the contract clearly does not require such interpretation and Waterman Steamship Corporation is in full accord with the contentions of the petitioner as set out in its brief. However, it wishes briefly to state certain additional arguments and authority on some of the points involved.

POINT I.

THE HISTORY AND PROVISIONS OF THE GOVERNMENT BILL OF LADING REFUTE THE GOVERNMENT'S CONTENTIONS.

The Government bill of lading was prescribed by the Comptroller General pursuant to authority contained in Title 31, U. S. Code, Sections 49 and 52 (f) (Cf. Title 4, Code of Federal Regulations, Part 8, Section 8.1). The authority granted the Comptroller General was to prescribe forms, systems and procedures "for administrative appropriation and fund accounting in the several departments and establishments, and for the administrative examination of fiscal officer's accounts and claims against the United States". He is also empowered to make "such rules and regulations as may be necessary for carrying on the work of the General Accounting Office * * *".

These grants of authority do not carry with them power to prescribe the terms and conditions, on which other governmental officers and agencies may contract in the Government's behalf. In his opinion on Government Bills of Lading (36 Ops. Att'y. Gen. 289), the Attorney General pointed out:

"Under sections 309 and 311 (f), *supra*, the Comptroller is authorized to prescribe by General Regulations the forms to be used in 'Administrative appropriation and fund accounting in the several Departments and establishments,' but no authority is granted by these provisions to limit by Regulation or by the adoption of Standard Forms the authority vested in other officers of the Government to make lawful contracts in its behalf. This conclusion appears to be quite obvious on the face of the statute. It is as clearly supported by the legislative history. . . .

"Of course, the bill of lading is an instrument which in addition to evidencing the contract of carriage must serve a secondary purpose in connection with Government accounting, and for such purposes no doubt the Comptroller General may prescribe its form, provided he does not undertake to impose contractual obligations upon the parties which they are legally entitled to negotiate. In its use for the purpose of 'administrative appropriation and fund accounting in the several departments and establishments' of the Government, the form of bill of lading, after its contractual terms and conditions have been agreed upon, is, by virtue of Sec. 309 of the Budget and Accounting Act, subject to the approval of the Comptroller General as a form for accounting purposes; but such approval can not in any way extend to the contractual obligations, which the parties are

entitled freely to negotiate without dictation from the Comptroller General, whose function is that of an accounting officer."

In view of the foregoing, it is fair to assume that in prescribing the form of the Government bill of lading the Comptroller General was concerned only with the establishment of forms and procedures for his accounting purposes. It was not his duty nor within his power to determine or prescribe the terms and conditions on which other Government agencies should contract.

Viewed in this light it is apparent that one of the chief purposes of the Government bill of lading is to serve the auditing purposes of the Comptroller General. As will be seen from an analysis of the various provisions of the Government bill of lading, so far as it sets forth any agreement between the parties it is largely a skeleton adopting by reference " . . . the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier".

In analyzing the Government form the first point to be noted is the language on its face: "Received from _____ by _____ the public property hereinafter described, . . . to be forwarded subject to the *conditions* stated on the reverse hereof . . .". (Italics supplied).

On the reverse side certain clauses are specifically labelled "Conditions". Others are labelled "Instructions" and still others "Directions". It is submitted that only the "Conditions" form the contract between the parties. All else must be considered as serving only the purposes of the Comptroller General. Hence resort to "Instructions" to determine or interpret the substance of the agreement between the parties is not justified.

Furthermore, examination of the Government form indicates that it was prepared principally with rail transportation in mind. On its face spaces are provided to indicate "size of car ordered", "size of car furnished", "Car No. ". Condition 1 on the reverse side states "payment will be made to the last carrier". Nowhere in the form is space provided for the name of a vessel, which is universally stated in ocean bills of lading.

No other Government form is provided for use in ocean transportation. The use of this form is a makeshift.* At any rate it obviously was not specially prepared with a view to customs and practices peculiar to ocean transportation. Hence it is ignoring realities to endeavor, as the Government and the majority of the Court below attempted, to spell out of language in the bill of lading, either in the "Conditions" or "Instructions", any specific intent to avoid the "freight earned on shipment" provision customary in and peculiar to ocean transportation.

Furthermore, upon analyzing the "Conditions" which alone form the contract of the parties, it becomes apparent that there was no intention to avoid the "freight earned on shipment" provision of the carrier's commercial form of bill of lading.

Condition 1 is obviously designed to avoid any delay in the transportation of Government goods. The stipulation against prepayment of charges is clearly to avoid the goods being held up until payment of freight in advance is obtained. As pointed out by the petitioner in its

* This appears to be confirmed by the fact that no special space is provided on the face of the Government form to show cubic measurement of the goods as is often necessary in ocean transportation. It is noted, however, that apparently as an afterthought a footnote was added giving the following instruction: "Show also cubic measurement for shipments via ocean carrier in cases where required."

brief, unless it were so provided the time required to clear such payments through the Government's cumbersome disbursing system would cause untold delays in the transportation of the goods. The Government attempts to put significance on other language in Condition 1 which forbids collection of charges from the consignee and thus deprives the carrier of its lien for freight. This, too, obviously was designed to avoid delay in the transportation and delivery of the goods for if the carrier could hold them subject to a lien the transportation of the goods would also be interrupted. It is straining the language and purpose of Condition 1 far beyond its obvious import to say it had any effect on the nature of the obligation to pay freight. It is clearly a provision to expedite transportation of Government cargo and to avoid delay at the time of shipment by stipulating against prepayment and at the time of delivery at destination by stipulating against the carrier's lien.

Condition 2 imports into the contract of the parties "the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier", unless the parties otherwise specifically provide.

It is of great significance that the bill of lading specifically provided which of the conditions governing commercial shipments should not apply in the case of loss of the goods, which is the situation here. Condition 7 specifically states that in case of loss, "the rules and conditions governing commercial shipments shall not apply as to period within which notice thereof shall be given the Carriers or to period within which claim therefor shall be made or suit instituted." Having thus dealt specifically with what commercial rules were to be excluded in case of loss of the goods, it must be assumed by elementary principles of construction that the rules governing the obliga-

tion to pay freight in case of loss of commercial shipments were not excluded and were to govern shipments made under Government bills of lading. *Manners v. Morosco*, 1919, 258 Fed. 557, 560; *Freston v. Lawrence Cement Co.*, 155 N. Y. 220; *Corpus Juris, Secundum*, Vol. 17, page 730.

Also, inconsistently with the Government's contention that, by implication, the Government bill of lading abrogates the "freight earned on shipment" provision of the carrier's commercial form, Conditions 3 and 5 show that the Government in shipping goods was seeking "the lowest rate" available even where that entailed a "restricted or limited valuation" of the goods.

Obviously ocean carriers would not apply the "lowest rate" to shipments on which, contrary to their established rules, the freight was at their risk in case of loss.

The Government puts much stress on the language of "Condition 1" to the effect that freight will be paid on the presentation of the bill of lading "properly accomplished". It contends these words are to be interpreted in the light of "Instruction 2" which provides that a certificate of delivery shall be executed by the consignee. This, the Government contends, is what is meant by "properly accomplished" and without it no freight is earned.

In this connection it is to be noted first that the instructions form no part of the contract. Secondly, nowhere in the bill of lading is there a definition of "properly accomplished". In the third place, the bill of lading does not provide that payment will be made *only* in the event the certificate of delivery is signed, or *only* in the event the bill of lading is "properly accomplished".

Further, "Instruction 2" does not purport to define what "properly accomplished" means. It merely says that after the signing of the delivery certificate and surrender of the bill of lading it "then becomes the *evidence* upon

which settlement for the service will be made". It does not say this is the "only evidence" on which it will be made.

Condition 1 and Instruction 2 merely state, in effect, that payment of freight will be made on compliance with certain formalities. Neither purports or could properly be considered to deprive the carrier of the right to freight under all other circumstances.

On the other hand, the word "accomplished" has a definite usage and meaning in connection with ocean bills of lading as pointed out in petitioner's brief and in the opinion of the trial Court. The trial Court aptly stated it as follows:

"The word 'accomplished' when used in association with the term 'bill of lading' has had a meaning in mercantile circles which goes back to the time when a bill of lading was prepared and signed in a set. It was customary to insert in bills of lading drawn in sets the provision that one of them 'being accomplished, the others to stand void'. The duty devolved on the master to make delivery to the rightful owner and if he had no knowledge that any other part of the bill of lading, other than the part presented, had been indorsed, he could 'properly and safely deliver in accordance with the indorsement and holding of the part presented, without inquiry as to the other'. Carver on Carriage of Goods by Sea, Sec. 502. 'If upon one of them the shipowner acts in good faith, he will have "accomplished" his contract, will have fulfilled it, and will not be liable or answerable upon any of the others.' *Glyn vs. East & West Indian Dock Co.* (1882), 7 A. C. 591 at p. 599, cited in Sec. 55. See G. H. M. Thompson, Bills of Lading p. 211, where he uses the word 'executed' as meaning the same thing as 'accomplished'—'One bill being executed, the others to be void'. See also Leggett, Bills of Lading p. 569; and Duckworth, Charter Parties and Bills of Lading page 74."

Thus it will be seen that

1. The Government bill of lading is largely a skeleton incorporating as its main provisions the "same rules and conditions as govern commercial shipments".

2. It does not contain any provision expressly overriding the "freight earned on shipment" provision of the carrier's commercial form.

3. It cannot be held to do so by implication in the case of goods lost, because it dealt expressly with such cases and only excluded application of the commercial rules relating to notices of loss and the time for filing claims and suits (Condition 7).

4. Any attempt to interpret the language of the "Conditions" by reference to the "Instructions" is not justified since the latter were designed only to facilitate auditing.

5. Finally, there is no language in either the "Conditions" or "Instructions" which require the inference for which the Government contends.

POINT II.

IF IT BE THOUGHT THERE IS ANY AMBIGUITY IN THE CONTRACT IT MUST BE CONSTRUED AGAINST THE GOVERNMENT, THE PARTY BY WHOM IT WAS DRAWN.

In the event of ambiguity, it is fundamental that in construing a contract it is to be construed strictly against the party by whom it was prepared or drawn. *Mutual Life Insurance Company of New York v. Hurni Packing Company*, 263 U. S. 167; *Moran v. Standard Oil Company*, 211 N. Y. 187, 196; *Gillet v. Bank of America*, 160 N. Y. 549; Williston on Contracts, Revised Edition, Vol. 3, §621.

The Government in its brief in opposition to the Petition for Certiorari referred to two cases where ambiguities in a bill of lading were resolved against a carrier. *Toyo Kisen Kaisha v. W. R. Grace & Co.*, 53 F (2d) 740; and *Pope & Talbot, Inc. v. Guernsey-Westbrook Co.*, 159 F (2d) 139. These cases, however, show nothing more than the application of the general principle to particular circumstances. In both cases the bill of lading involved was prepared by the carrier. The language to be construed was the language employed by the carrier. If it admitted of ambiguity, under the fundamental and familiar rule, the ambiguity was to be resolved against the carrier as the author of the bill of lading. In this case the language to be construed is the language of the Government. The same fundamental and familiar rule requires that such ambiguity, if any there be, be resolved strictly against the Government.

POINT III.

REVISED STATUTE 3648 (31 U. S. C. §529) DOES NOT RELIEVE THE GOVERNMENT OF ITS OBLIGATION TO PAY EARNED FREIGHT.

The Government also contends that because of Revised Statute 3648 (31 U. S. C. §529) its bill of lading must be construed to mean that freight is not earned unless and until the cargo has been delivered at destination for to do otherwise would violate the statute.

At the time in question the pertinent part of the statute read as follows:

“Except as otherwise provided by law, no advance of public money shall be made in any case. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for

the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment."

The Government argues that the statute means that in no case can it make payment under any contract in excess of the "ultimate benefit" it derives. It thus interprets "value of services rendered" to mean "ultimate benefit derived from the services". It is evident that the two are not equivalent and this is the fundamental fallacy in the Government's position. The word "value" as used in the statute clearly means price or amount payable under a contract since the section specifically mentions contracts for services and goods without limitation on these terms except as to the time when payments may be made.

In any case "value" and "benefit" are not synonymous for the law abounds in examples, which need no citation of authority, where the value of services is not measured by benefit conferred. A lawyer may have his fee though he lose his case, a broker his commission though the goods do not arrive, and a gardner his hire though the rains wash away the fruits of his labor. The test is whether one has done that which he contracted to do and not the benefit conferred.

It is noteworthy that, so far as can be found, in the century and a quarter during which the statute has been in effect only once previously has the Government suggested that because of this statute "ultimate benefit derived" measures its contract obligations. Such a contention was made in *McClure v. United States*, 19 Ct. Cl. 173 (1884), but the Court held the claimants were entitled to recover "although the Government may not have received any benefit in consequence of the destruction of the subject matter of the agreement".

Applied logically, the Government's contention would require the fruits of every contract to be separately examined to determine the extent of the Government's obligation or whether it had any at all. Indeed it might well render it impossible for the Government to carry on its normal and necessary functions and the Attorney General in his opinion reported 32 Ops. Att'y Gen. 433 (1921) suggested such possible consequences.

Furthermore, the expenses of the Government would presumably be increased for if, in this case, the freight was at the carrier's risk, the cost of transportation of other shipments for the Government would have to be increased to compensate for the assumption of such risk or the cost of insuring it.

In another instance the Attorney General suggested that a Government contract could be appropriately modified to enable the Government to make payments which were prohibited by the statute. 21 Ops. Att'y Gen. 12 (1894). It seems clear that he regarded the statute as prohibiting certain payments because the services contracted for had not been completed but he saw no objection to the parties modifying the service contracted for to make possible the payments.

The only pertinent inquiry, therefore, is what was the service for which the Government contracted. It contends, in effect, that it contracted for the carriage of the cargo from Mobile to Port of Spain and sound delivery there, *at all events and under all circumstances*. This, however, was not the contract, nor the service for which it bargained. It clearly appears from the carrier's commercial form bill of lading (incorporated in the Government form) that the carrier's undertaking was not absolute and unconditional. It was subject to a variety of contingencies any of which

would relieve it from further performance. It was for "service" so subject and so conditioned that the Government contracted and for such service it agreed to pay freight to be irrevocably earned and due when the goods were delivered to the carrier.

The voyage commenced but the vessel was torpedoed and sunk, one of the contingencies against which the contract provided. No further performance by the carrier was required or contemplated. It had thus fully performed the service for which the Government bargained and agreed to pay.

That the foregoing correctly describes the nature of the service to be rendered by the carrier was long ago recognized by the Comptroller of the Treasury in rendering an opinion on the liability of the Government for Ocean Freight Charges, whether the goods were delivered or lost enroute, under bills of lading containing provisions similar to those here involved. 24 Dec. Comp. Treas. 707 (1918). The then Comptroller said:

"The liability of the Government for freight charges would therefore arise when the shipment is actually made, whether delivered to destination or lost with the destruction of the vessel.

"Section 3648, Revised Statutes, prohibits payment in excess of the service rendered. Under the circumstances outlined in this case the service required to be performed and for which payment may be made is the delivery of the property to the consignee or an excusable failure to make such delivery, evidence of one or the other of which should be furnished."

As previously pointed out, this view prevailed as late as April 7, 1942, when the Comptroller General stated in his decision, reported in 21 Comp. Gen. 909 at 913:

"In any event, it would appear that where the carrier claims charges without showing delivery of the shipment it reasonably may be required to show what particular facts or circumstances it relies upon as relieving it from the duty to effect delivery and obtain receipt from the consignee, and to certify that so far as known the shipment would have been delivered but for such facts and circumstances. See decision of May 27, 1918, 24 Comp. Dec. 707."

That an ocean carrier's services and undertakings are not and for long past have not been absolute and unconditional but qualified in view of the hazards to be encountered has been fully recognized in this Court and in the Court below and a carrier's right to freight does not depend on sound delivery. *Allanwilde Transport Corp. v. Vacuum Oil Company*, 248 U. S. 377; *International Paper Co. v. The Gracie D. Chambers*, 248 U. S. 387; *Standard Varnish Works v. The Bris*, 248 U. S. 392; and *The Quarrington Court*, 122 F. (2d) 266, 268 (C. C. A. 2, 1941).

CONCLUSION.

THE DECISION OF THE COURT BELOW SHOULD BE REVERSED
AND THE DECISION OF THE TRIAL COURT REINSTATED.

Respectfully submitted,

L. DE GROVE POTTER,
Counsel for Waterman Steamship
Corporation as *Amicus Curiae*.

Of Counsel:

CLEMENT C. RINEHART,
WALTER P. HICKEY.

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 271

ALCOA STEAMSHIP COMPANY, INC.,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

**BRIEF OF STOCKARD STEAMSHIP CORPORATION
AS AMICUS CURIAE IN SUPPORT OF THE PETITION
FOR CERTIORARI AND MOTION FOR LEAVE TO
FILE BRIEF**

HAROLD S. DEMING,
Counsel for Stockard Steamship Corporation,
as *Amicus Curiae*.

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 271

ALCOA STEAMSHIP COMPANY, INC.,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The undersigned, as counsel for Stockard Steamship Corporation, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae* in support of the Petition for *Certiorari*.

HAROLD S. DEMING,
Counsel for Stockard Steamship Corporation
as *Amicus Curiae*.

Supreme Court of the United States

OCTOBER TERM, 1949

No. 271

ALCOA STEAMSHIP COMPANY, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF STOCKARD STEAMSHIP CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR *CERTIORARI*

Statement

Stockard Steamship Corporation has a vital interest in the decision of the novel issue involved in the instant petition. Stockard Steamship Corporation is the libellant in a suit in the Southern District of New York for \$73,408.52 for compensation admittedly due from the United States under a general agency contract, but withheld so as to be applied against sums allegedly overpaid by the United States to Stockard on account of freight moneys earned under previous transportation contracts.

\$70,458.42 of the amount so withheld represents freight previously paid by the United States under a contract of affreightment for the carriage of army cargo aboard the s/s William J. Salman which was lost by enemy action before the cargo could be delivered.

This cargo, like that in the instant case, was shipped under the standard government form of bill of lading, and the Stockard form of bill of lading incorporated therein by reference contained provisions substantially identical with those construed by the court below in the instant case.

Payment of the freight on this shipment was made by the United States without question pursuant to what had been the long settled interpretation by the government of the applicable provisions of the bill of lading.

Subsequently the government, on the basis of the same contentions put forward in the instant case, reversed its position and recouped from moneys admittedly due to Stockard the freight previously unquestioningly paid.

The Issue

The issue raised is whether the government as a shipper is *specifically* exempt under the terms of the standard government bill of lading from the customary liability of shippers for freight where delivery of the cargo has been prevented by causes for which the carrier is not liable, where such freight liability is specifically provided for in the carrier's form of bill of lading incorporated by reference in the contract of carriage.

Reasons Why Certiorari Should Be Granted

As a general carrier of goods by water vitally affected by the decision of the instant issue, Stockard Steamship Corporation is fully in agreement with the reasons for granting certiorari and the supporting arguments set forth in the Petition and the accompanying Brief. Those reasons and arguments and the additional reasons set forth in the Brief Amicus Curiae which it is understood Waterman Steamship Corporation has moved for permission to file amply demonstrate, it is respectfully submitted, the widespread importance of a review of the question by this Court.

Stockard Steamship Corporation, therefore, wishes merely to advert briefly to a few of the errors in the decision below which most strongly emphasize in relation to the pending Stockard suit the unfairness of the impact of the novel rule enunciated by the Court below.

1. The government's present contention that unlike every private shipper it is exempt under its form of bill of lading from the customary liability for freight even though delivery of the cargo at destination is prevented by an excepted cause is a reversal of a longstanding government interpretation and policy. 24 Dec. Comp. Tréas. 707 (1918); 21 Comp. Gen. 909, 913 (1942). The action of the court below in sustaining this sudden reversal of position is directly contrary to firmly accepted standards of interpretation. The decision of the court below emphasizes the *power* of the government to exempt itself from the customary obligations regarding freight. Because the government *could*, the court below infers that it *intended* to and *did* do so. On the contrary, the fact that the government itself drew the controlling bill of lading and could draw it on its own terms means under settled principles of construction that the bill of lading must be construed in the case of any ambiguity *against* the government.

The necessity of such a construction is, of course, greatly emphasized by the fact that the government, as above pointed out, adopted and acted upon over a period of many years an interpretation directly opposed to that for which it now contends.

2. The sudden and belated reversal of position by the government operates as a great hardship on Stockard Steamship Corporation and other companies which made all their arrangements and commitments in reliance on the long accepted and natural interpretation of the language involved. And, of course, any future shipments which Stockard Steamship Corporation and other general carriers of goods by water may make under the government form

of bill of lading will be subject to indeterminate risks until this question, which it is understood is now in suit in other circuits as well, is determined by this court.

CONCLUSION

It is respectfully submitted that certiorari should be granted.

Respectfully submitted,

HAROLD S. DEMING,
Counsel for Stockard Steamship Corporation,
as *Amicus Curiae*.

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SUPREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 271.

ALCOA STEAMSHIP COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION OF WATERMAN STEAMSHIP CORPORATION
FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*,
AND BRIEF OF *AMICUS CURIAE*.

L. DE GROVE POTTER,
*Counsel for Waterman Steamship Corporation
as Amicus Curiae.*

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 271.

ALCOA STEAMSHIP COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS
—*AMICUS CURIAE*.

The undersigned, as counsel for Waterman Steamship Corporation, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae* in support of the Petition for *Certiorari*.

L. DE GROVE POTTER,
Counsel for Waterman Steamship
Corporation as *Amicus Curiae*.

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 271.

ALCOA STEAMSHIP COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF WATERMAN STEAMSHIP CORPORATION
AS *AMICUS CURIAE* IN SUPPORT OF THE
PETITION FOR *CERTIORARI*.

STATEMENT.

Waterman Steamship Corporation has a serious and two-fold interest in the question presented. It has brought a suit against the United States in the District Court for the District of Alabama, which suit includes a claim against the Government for freight in the sum of \$141,443 which the Government has failed to pay for a voyage which terminated short of original destination. Although the Government has not yet answered in that suit nor finally stated its position, it is believed that it is awaiting final determination of the question raised in the present suit. Furthermore, as carrier and operator of ocean vessels which have

and are expected to continue to carry government cargo under the government form of bill of lading, it is important to the Waterman Steamship Corporation that the question here involved be decided so that it can determine what freight charges and insurance coverage are required.

THE QUESTION PRESENTED.

The question presented is whether the terms of the Government form of bill of lading, use of which is necessary in the carriage of Government cargo by water, exempt the Government from the liability for freight which private shippers are under when carriage of the cargo to destination is prevented by causes for which the carrier is not responsible. The determination of the question depends on the proper interpretation of the Government form of bill of lading read in conjunction with the customary provision appearing in commercial bills of lading that freight is earned on shipment of the goods, such customary provisions being incorporated by reference into the Government bill of lading as part of the contract of carriage.

ADDITIONAL REASONS FOR GRANTING CERTIORARI.

The Petition points out the importance of the question, the errors of the Court below and the serious effects which will result if the decision below is allowed to stand, with all of which Waterman is in full accord. However, it is desired to submit the following additional reasons for granting *Certiorari*:

1. The question presented is not confined to cases where Government cargo has been lost due to enemy action as in the present case. The question will arise in every case

where a carrier is prevented from delivering Government cargo at the port of destination by Act of God, peril of the seas, unavoidable breakdown or any other reason for which the carrier is not responsible.

Indeed, although the Government's position is not yet fully known, the question may be raised in the suit now pending against it by Waterman in Alabama. In that case the Government shipped a cargo of potatoes on the S.S. *George Chaffey* from Beaumont, Texas for carriage to Bremen, Germany. During the voyage the vessel put into New York for repairs after which it was ready to continue the voyage to the original port of destination. However, some of the potatoes had spoiled and the Government sold the cargo and required that it be discharged thus causing the termination of the voyage at New York. Nevertheless it has failed to pay freight after due demand and presentation of proper documents and vouchers. Presumably it has failed to do so for the reasons asserted in defense of the present case.

2. For many years the Government has considered that under documents such as here involved it was liable for freight even though the carrier was unable to deliver the cargo. 24 Dec. Comp. Treas. 707 (1918) and 21 Comp. Gen. 909 at 913 (1942). The Government's interpretation over these many years should be strongly persuasive of what it intended and understood to be the true meaning of the bill of lading of which it was the author. At any rate never before has the Government contended that it was on any different footing with respect to liability for freight than any private shipper, although admittedly the method of payment may be different. Having now reversed its position, unless the question is finally settled by this Court, it

will continue to arise in every case where there is a non-delivery at port of destination of Government shipments. Meantime, both the carrier and the Government will be uncertain as to where the risk of freight rests. Carriers in particular are and will be faced with the serious problem of determining proper and adequate freight rates and insurance coverage.

3. Furthermore, the decision of the Court below is not controlling on the Courts of other circuits where it is understood similar cases are pending. Accordingly, future applications undoubtedly will be made to this Court for review of the question unless it is settled now.

CONCLUSION.

It is respectfully submitted that for these additional reasons *Certiorari* should be granted. No attempt is here made to argue the legal questions involved because Waterman is in accord with the arguments set forth in the Petition and Petitioner's accompanying brief.

Respectfully submitted,

" L. DE GROVE POTTER,
Counsel for Waterman Steamship Corporation,
as *Amicus Curiae*.